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In The
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1398

KLENNA ANN FLETCHER,
Petitioner,
versus

FLORIDA PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

INTRODUCTION

Petitioner respectfully prays that a Writ of Certiorari be issued to review the opinion and final order of the Supreme Court of the State of Florida, opinion filed October 7, 1976. Petiiton for Rehearing denied on January 10, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 340 So.2d 914 (Fla. 1976) and is set forth in the Appendix, pages A - 38-50.

The opinion of the First District Court of Appeal, State of Florida is reported at 319 So.2d 100 (Fla. 1st DCA, 1975) and is set forth in the Appendix, pages A - 14-37.

The opinion of the Circuit Court, Fourth Judicial Circuit, State of Florida is reported at 40 Fla.Supp. 1 (Cir. Ct., 1974) and is set forth in the Appendix, pages A - 3-13.

2.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 USC §1257(3), this being a Petition for Writ of Certiorari, and in accordance with Rule 19 of the Supreme Court Rules.

The opinion and final order of the Supreme Court of Florida was entered on October 7, 1976. The Petitioner's Petition for Rehearing was denied by the Supreme Court on January 10, 1977.

3.

QUESTIONS PRESENTED

(A) Whether the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Federal Constitution protect a citizen's right to privacy against invasion by a newspaper publishing company?

(B) Whether a newspaper publishing company violates a homeowner's right to privacy and civil rights (42 USC 1983) where its newspaper photographer and reporter entered without permission the bedroom of the owner's home and photographs a silhouette of the homeowner's daughter left in the bedroom floor as a result of a fire in the home and the publishing company publishes the photograph of the silhouette of death and other photographs taken in the home?

(C) Whether the First Amendment of the Federal Constitution permits a newspaper photographer and reporter to trespass into the sanctity of a bedroom of a private home

and invade the privacy of a homeowner by publishing private facts occurring in the home and publishing photographs taken during the wrongful entry?

(D) Whether the State of Florida may adopt a custom and usage to allow newspaper reporters and photographers to accompany police officers and fire marshals into the bedrooms of the homes of the citizens of the State of Florida where there has been a fire to gather information and photograph inside the homes where the newspaper reporters are not assisting the officials and have not entered with the consent of the owners of the homes and whether such custom and usage violates the Federal Constitution and Civil Rights Act, 42 USC 1983?

(E) Whether a fire that occurred in a homeowner's home, with the resulting death of her daughter, leaving a silhouette burned in the bedroom floor of her home, constitutes a matter of public controversy and interest sufficient to insulate the publishing company for the acts of its newspaper reporters and photographers in entering into the homeowner's home and publishing the photographs taken during the entry without obtaining prior approval of the homeowner?

4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

This case also involves violation of rights guaranteed by the Civil Rights Act, 42 USC §1983.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC §1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

5.

STATEMENT OF THE CASE AND FACTS

Proceedings in the Trial Court.

The Petitioner brought suit in a three-count complaint in the Circuit Court, Fourth Judicial Circuit, In and For Duval County, Florida, alleging in Count I of the Complaint an action for trespass and for invasion of privacy for the wrongful entry into the Petitioner's home by the Respondent publishing company's photographers and reporters. Invasion of the Petitioner's privacy is also sought in Count I for the intrusion into the Petitioner's private life for the wrongful publication of the silhouette photograph and other photo-

graphsof the interior of the Petitioner's home by the Respondent publishing company's photographers and reporters published on the front page of the Florida Times-Union, September 16, 1972 issue (Appendix, pages 1-2). The silhouette was left by the Petitioner's deceased daughter burned into the floor of the bedroom in the Petitioner's home as a result of a fire in the home.

The Respondent answered Count I of the Complaint setting forth twelve defenses including the defense that the matter was a news event of great public interest and concern and protected under the First andFourteenth Amendments to the United States Constitution, that the right of privacy does not prevent any publication of the matter which is of general or public interest citing *Time v. Hill*, 385 US 374, 17 L.Ed.2d 456 (1967) and *Rosenbloom v. Metromedia, Inc.*, 403 US 29, 29 L.Ed. 2d 296 (1971). Additionally, the defense that the news media may lawfully enter upon private premises as a common custom and usage where the entry is for the purpose of publication of matters of public interest and concern. (Appendix, Pages 56-59). The issues then, of the Constitutional and Federal questions were specifically drawn in the Trial Court.

On September 15, 1972, while the Petitioner was temporarily absent from the City of Jacksonville, and absent from her residence on Castellon Drive, a fire broke out in the home, which caused the death of her daughter, Cindy Sloan Fletcher, in one of the bedrooms in the home. The silhouette of the deceased, Cindy Sloan Fletcher, was left in the bedroom floor of the Petitioner's home due to the said fire and the smoke in thehome. Immediately after the fire was extinguished, on September 15, 1972, and while the Petitioner was still temporarily absent from her home, the Respondent, acting through

its newspaper reporters and photograhers, entered the Petitioner's said home without requesting or receiving prior authorization from the Petitioner, and without the Petitioner's knowledge or consent.

The entry into the Petitioner's home was made by the Respondent's reporters after they had been advised that a child's body had been found in the bedroom on the second floor of the home. The initial entry was made by the Respondent's reporters and photographers after the fire had been extinguished and after the emergency was over. There was nothing to indicate that the officials, being the fire marshal and sergeant, had, in the absence of an emergency, any authority to invite or allow the photographers of the Respondent to enter the home, nor was there any contention that the initial entry into the bedroom of the Petitioner's home was for the purposes of rendering any assistance to the occupants nor to the officials. Fire Marshal Henry Edward Melzer, and Sergeant Paul H. Short of the Sheriff's Department, did not prevent the newspaper photographers' initial entry into the home of the Petitioner, and the said newspaper photographers initially entered the home knowing that the Petitioner was not at home and knowing that no authorization was given for entry other than the fact that the fire marshal and sergeant did not prevent their entry.

The Respondent's newspaper photographers and reporters went through the foyer of the home, upstairs to the bedroom on the second floor, and there began taking photographs, all while the body of the deceased child of the Petitioner lay exposed, blackened and burned on the floor. Once the photographers were in the home, they began having access of their own to the entire home, wandering through it and photographing it from inside and out, all without the Peti-

tioner being at home, and without anyone giving them authorization who was in possession or ownership of the home.

Sometime thereafter, the fire marshal and Sergeant Short desired a picture of the silhouette of the Petitioner's child's body, which was left on the floor after the removal of the body, and instead of calling the evidence technician, decided to have the picture taken by Bill Cranford of the Respondent's publishing company. This picture of a silhouette of the body of the child, taken in the bedroom of the Petitioner's home, was taken as part of the official investigation of the sheriff and fire marshal. Each investigative report is not open to the public for review, but is an official report and confidential.

The newspaper photographers had not apprised the fire marshal or sergeant that they were going to publish any of the photographs that were taken inside the home. Mr. Melzer and Sergeant Short did not know that the pictures taken inside the home were going to be used for commercial purposes, nor did they know that the silhouette picture was going to be published on the front page of the September 16, 1972 issue of the Florida Times-Union.

On Respondent's Motion for Summary Judgment, the Trial Court entered a Summary Final Judgment on January 4, 1974, granting the Respondent's Motion for Summary Judgment in all respects. (Appendix, pages 3-13).

The Trial Court specifically held that there can be no recovery for an invasion of privacy by the publication of a true story of a matter of public interest which the Court found existed. Citing *Time v. Hill* and *Rosenbloom*.

The Trial Court determined that the fire was a matter of public interest, but that the media could not be held in damages for what others call a breach of good judgment, and based its ruling on the First Amendment.

Proceedings in the First District Court of Appeal.

The First District Court of Appeal reversed the Trial Court and in an Opinion written by the Chief Judge, Tyre Boyer, specifically noted the Petitioner did not either impliedly or expressly invite the newspaper employees into her home, nor was there anything in the record to indicate that she or persons in like circumstances had acquiesed in persons coming into her home. There was nothing to indicate that the officials had, in the absence of an emergency, the authority to invite others to enter the home and the fire had been extinguished prior to the entry into the home and the emergency was over. The employees of the Respondent did not enter the home for the purpose of rendering assistance to the occupants, nor to the officials. The First District noted the case of *Dietmann v. Time, Inc.*, 449 Fed.2d 245 (9th Cir. 1971) as being a case analogous to the case in fact. The First District, in following *Dietmann*, held that the First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathing and is not a license to trespass, to steal or to intrude by electronic means into the precincts of another's home. The First District rejected the Trial Court's proposition of law that the *New York Times Co. v. Sullivan*, 376 US 254 (1964) and *Rosenbloom v. Metromedia* (supra) insulated news publishing companies under the First Amendment from tortous gathering of news (the entire opinion of the First District is provided in the Appendix at pages 14-37).

Proceedings in the Florida Supreme Court.

The Supreme Court of Florida reversed the First District at the urging of the Respondent and Amicus Curiaes from the major publishing companies in the United States and of Florida. The Supreme Court of Florida held that where there was a matter of interest to the public, common custom and usage permitted governmental officials to invite newspaper photographers into the sanctity of a home and to take photographs therein. The Supreme Court of Florida held that the First Amendments protects a publishing company in this instance from liability and equated "public controversy" with all controversies of interest to the public, even if they occur in the bedroom of a private home. "Newsmen" are now allowed entry into all parts of a home in Florida where any governmental agency is called to the home. A Petition for Rehearing was denied by the Florida Supreme Court on January 10, 1977.

6.

ARGUMENT

The Federal questions are substantial.

The Supreme Court of Florida has decided substantial Federal questions not previously determined by any Court. The questions presented have not been previously considered by the Supreme Court of the United States.

The Respondent, in its suggestion to certify the Supreme Court, pages 60-61 of the Appendix) states as follows:

> "This decision affects not only the public but every newspaper, every television station, every radio station, and every aspect of the news media in every part of Florida . . .
>
> "There are important constitutional questions here under both the Florida and United States Constitutions . . .
>
> "Not only is this question important both to Florida and nationwide . . ."

The Petitioner would respectfully agree with the Respondent that the questions decided in this case are substantial Federal questions which involve the Federal Constitution and have nationwide impact and should be decided by the Supreme Court of the United States.

In a line of decisions going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 US 250, 35 L.Ed. 734, (1891), the Supreme Court of the United States has recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy exist under the Constitution. In varying contexts, the Court or individual Justices have found the roots of that right of privacy in the First Amendment. See *Stanley v. Georgia*, 394 US 557, 22 L.Ed.2d 542, (1969); in the Fourth and Fifth Amendments, see *Terry v. Ohio*, 392 US 1, 20 L.Ed. 2d 889 (1968), *Katz v. United States*, 389 US 347, 19 L.Ed2d 576 (1967), *Olmstead v. United States*, 277 US 438, 72 L.Ed. 944 (1928) (Brandeis, Jr., dissenting); particularly 277 US, 478, in the Bill of Rights, *Griswold v. Connecticut*, 381 US at 484-485, 14 L.Ed.2d 510, in the Ninth Amendment, id., at 486, (Goldberg, J., concurring); in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 US 390, 67 L.Ed 1042, (1923).

Privacy, though not expressly mentioned in the Federal Constitution, is essential to the exercise of the other rights guaranteed by it. *Osborn v. United States*, 385 US 323, 17

L.Ed.2d 394, (1966) (from separate opinion by Douglas, J.)

The right of privacy has been recognized in the State of Florida as early as 1947, in *Cason v. Baskin*, 30 So.2d 635 (Fla. 1947)

In *Gertz v. Robert Welch, Inc.*, 418 US 323, 41 L.Ed.2d 789, (1974) and in *Time, Inc. v. Firestone*, ... US ...., 47 L.Ed. 2d 154, (1976), this Court has restricted "public interest" in libel cases, increasing protection to private citizens inadvertently thrown into the public limelight.

This decision of the Supreme Court of Florida converts the home and the privacy of the home into a public place at the whim of the newsmedia and governmental agencies. The decision has such far reaching effect that it has been termed by the Respondent to be "the most important news media case before the Court today." The eleven amicus curiae briefs in support of the Respondent, filed in the Supreme Court of Florida, represented the leading publishing companies throughout Florida and the United States.

In the case at bar, the constitutional questions concerning privacy and invasion of the rights of privacy should be determined by the highest court of our land.

CONCLUSION

Accordingly, the Petitioner prays that this Honorable Court grant her Petition for Writ of Certiorari herein, filed to review the Opinion and Final Order of the Supeme Court of Florida.

Respectfully Submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the printed petition for Certiorari to the Supreme Court of Florida has been furnished to Harold B. Wahl, Esquire, by hand, this the 11th day of April, 1977.

GRISSETT, HUMPHRIES & NEDER

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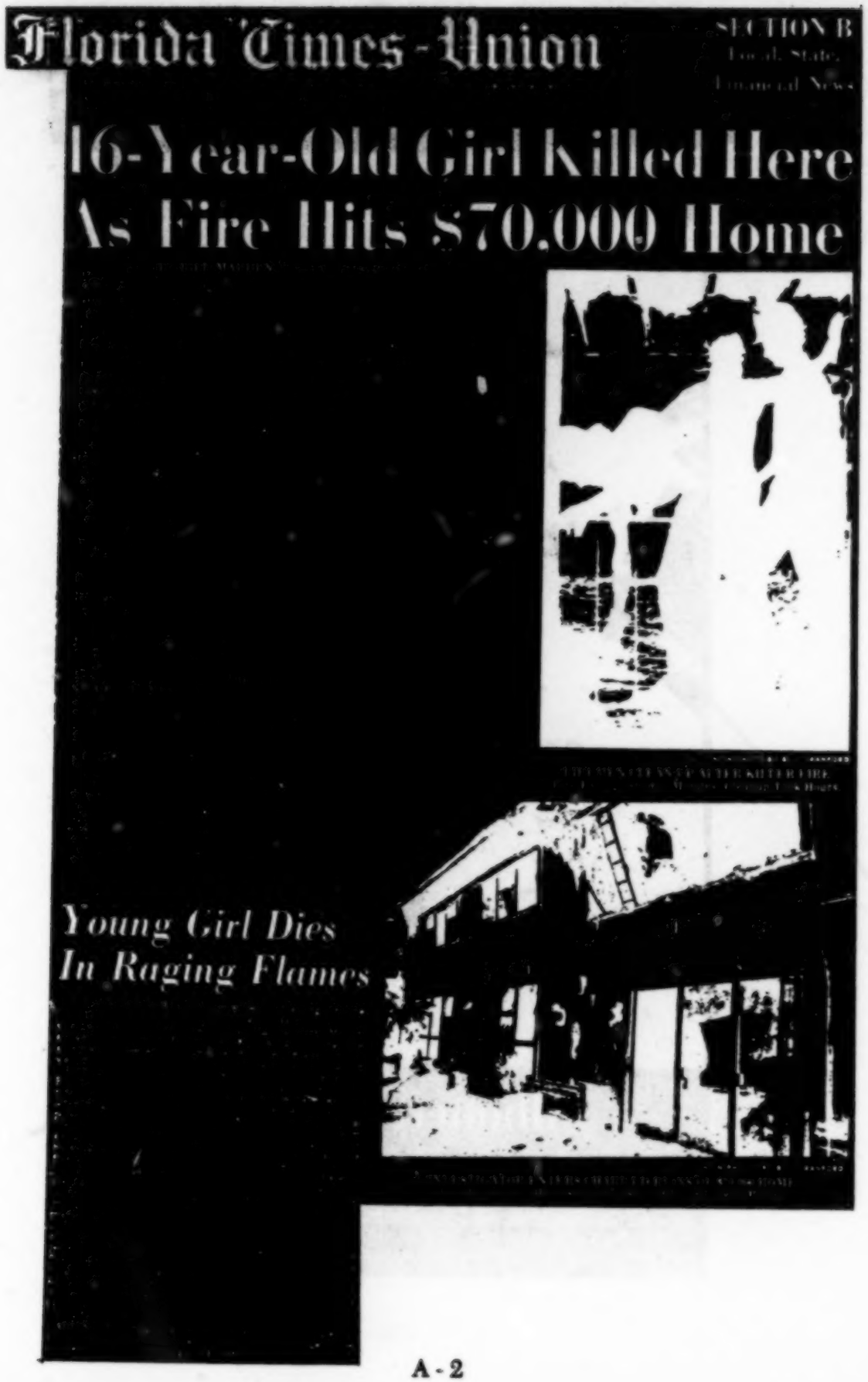
The Florida Times

Silhouette of Death


Florida Times-Union

SECTION B
Local, State, Financial News

16-Year-Old Girl Killed Here As Fire Hits $70,000 Home

Young Girl Dies In Raging Flames

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

KLENNA ANN FLETCHER,

Plaintiff,

vs.

FLORIDA PUBLISHING COMPANY,
a Florida Corporation,

Defendant.

SUMMARY FINAL JUDGMENT

The Plaintiff has sued the Defendant for trespass, invasion of privacy and intentional infliction of emotional distress. The court dismissed Count II of the complaint, seeking damages for an invasion of privacy, without leave to amend and denied a motion to dismiss Count I seeking damages for trespass. The Plaintiff filed an amended complaint adding a Count III which seeks to recover damages for intentional infliction of emotional distress by the Defendant. To Count III, the Defendant has filed motions to strike and dismiss.

The Defendant also filed a motion for summary judgment and at the hearing on all the motions, urged the court to rule on the motion for summary judgment and to consider, for such motion, that Count III states a cause of action. The court therefore deems said motions to dismiss and strike to be waived by the Defendant. The matters alleged in Counts I and III have been answered by the Defendant and said causes are at issue.

The court dismissed Count II of the complaint without leave to amend. It is abundantly clear to the court that there

can be no recovery for an invasion of privacy by the publication of a true story of a matter of public interest which the court found exists here. There was no allegation of falsity of the matters alleged to have been published by the Defendant. See *Cason v. Baskin* (Fla. 1947) 30 So. 2d 635, 638; *Jacova v. Southern Radio* (Fla. 1955) 83 So. 2d. 34, at 40; *Benson v. Florida Publishing* (Fla. 1971) 262 So.2d. 196, at 37 Fla. Supp. 157; *Time v. Hill* (1967) 385 U.S. 374; and *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, at 43,44,48. Also, it is settled that one cannot recover for the alleged invasion of privacy of a deceased person, no matter how close the relationship of the deceased to the one seeking damages. See *Cordell v. Detective Publications* (C.A.6, 1969) 419 F. 2d. 989; 32 Fla. Jur., Torts, Section 10, 1973 Supplement; and *Young v. That Was The Week That Was* (C.A. 6, 1970) 423 F. 2d. 265.

The court finds there is no real dispute as to the material facts. Mrs. Fletcher left Jacksonville for New York on September 15, 1972, to visit a friend. She left in Jacksonville her three young daughters, including seventeen-year-old Cindy. A "baby sitter" was to spend the nights with the children, but there was no one with them in the home during the daytime except a young man who had a room in the house and whom Mrs. Fletcher described as Cindy's "boy friend." On the afternoon of September 15, 1972, while Cindy was alone in the house, a fire of undetermined origin did large damage to the home, and Cindy died.

The fire and police departments were called by a neighbor who discovered the fire, but too late to save the child. A large group of firemen, news media representatives, and onlookers gathered at the scene and on Mrs. Fletcher's property.

When the Fire Marshal and Police Sergeant Short entered the house to make their official investigation, they invited the news media to accompany them, as they deposed was their standard practice. The media representatives entered through the open door; there was no objection to their entry; they entered quietly and peaceably; they did no damage to the property; and their entry was for the purpose of their news coverage of this fire and death.

The Fire Marshal desired a clear picture of the "silhouette" left on the floor after the removal of Cindy's body. He and Sergeant Short in their depositions explained that the picture was important for their respective investigations to show that the body was already on the floor *before* the heat of the fire did any damage in the room. The Fire Marshal took one polaroid picture of the silhouette, but it was not too clear, he had no further film, and he requested photographer Cranford to take the "silhouette" picture which was made a part of the official investigation file of both the Fire and Police.

This picture was not only a part of the investigation but News Photographer Cranford turned it and his other pictures over to the defendant newspaper. It and several other pictures appeared in the news story of the Florida Times-Union on September 16, 1972.

As to Count I, the question raised by the motion for summary judgment is one of law as there is no genuine issue of material fact. The question raised is whether the trespass alleged in Count I of the complaint was consented to by the doctrine of common custom and usage.

The law is well settled in Florida and elsewhere that there is no unlawful trespass when peaceable entry is made, without objection, under common custom and usage. See *Prior v. White*

(1938) 132 Fla. 1, at 19, 180 So. 347; *Boston v. Fornalski* (Fla. D.C.A. 4, 1970) 234 So. 2d. 386, 387; 52 Am. Jur., Trespass, Section 39; 87 C.J.S., Trespass, Section 49b; Conley on Torts (4th Edition) Sections 251 and 248; Harper and James on Torts, Section 1.11; Restatement of the Law of Torts, Section 167 (d), Trespass, page 403.

In *Martin v. Struthers* (1943) 319 U.S. 141, 149, the Court struck down as unconstitutional and "invalid in conflict with the freedom of speech press" a city ordinance which made it unlawful trespass to knock on doors and ring doorbells to distribute literature. In so doing, at pages 147-149 it made the far reaching pronouncement followed by the Florida Supreme Court in *Prior v. White* (Fla. 1938) 132 Fla. 1,180 So. 347, 356:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. ***We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away."

In *McKee v. Gratz* (1922) 262 U.S. 127, the Supreme Court recognized the rule that it was not trespass when under the "habits of the country" entry was commonly made.

A case which has just been decided illustrates the principles applicable here. See *Cantrell v. Forest City Publishing Company* (Case #73-1081, decided by the United States Court of Appeals for the Sixth Circuit on September 10, 1973)--Fed. 2d.--. There plaintiff sued for $1,000,000 compensatory damages, plus another $1,000,000 punitive damages. The newspaper reporter and photographer, without permission, and

while the plaintiff widow was away with only children at home, entered her home, took 50 pictures, and thereafter published a story and pictures to which Plaintiff objected. In paragraph (12) of her complaint, a copy of which has been furnished the court, Plaintiff alleged an "unwarranted trespass" on her property without her consent, and in "deliberate and scornful disregard of the rights of plaintiffs to security of their persons, family and home, and their precious right of privacy." There, as here, the trespass was relied on as a basis for claiming damages for the publication.

There is no force used in the entry and no physical damage to the property. The publication complained of was a feature story which, in the words of the court, "placed the Cantrell family in a bad light because of its inaccuracies and untruths." It was a follow up on a bridge collapse where 44 persons lost their lives, including the deceased husband.

In Cantrell, the court ruled that the "judgment of what is news worthy must remain primarily the function of the publisher," that there was no basis to hold there was no "newsworthiness," and that in the absence of "calculated falsehood" (See *St. Amant v. Thompson* (1968) 390 U.S. 728, 733) judgment must be entered for defendant newspaper.

Not only did the Fire Marshal and Detective Sergeant Short testify it was common custom and usage to permit the news media to enter under the circumstances here, and of the great number of times they had permitted it in private homes, but many affidavits were filed to the same effect, including those of Duval County Sheriff Carson and Florida Attorney General Shevin.

Similar affidavits have been filed from the Chicago Tribune; the ABC-TV News, New York; the Tallahassee Democrat;

the Pensacola Journal; the Associated Press; the President of the American Newspaper Publishers Association; the Miami Herald; United Press International; the Florida Times-Union and Jacksonville Journal; the Washington Post; TV-12 at Jacksonville; TV-10 at Miami; TV-4 at Jacksonville; the New York Daily News; the Milwaukee Journal; the Birmingham Post-Herald; the Memphis Commercial-Appeal; the Macon Telegraph; and the Tampa Tribune; all attesting that it is common usage, custom and practice for news media to enter private premises and homes under circumstances like those here.

Plaintiff filed no affidavits except her own; she makes no attempt to qualify as an expert; and she simply states her personal belief generally, without going into the situation involving coverage of a news story of public interest. She shows no qualifications to make an affidavit on the custom and usage in such matters.

In Mrs. Fletcher's deposition, she stated she was in New York at the time of the fire; there was no one at the scene who objected to the entry; and she makes it clear she does not contend there was any force used for entry, or any physical damage done to the premises.

Plaintiff likewise concedes that it was perfectly proper for the Fire and Police to enter without permission. The Fire and Police used the picture as part of their official investigation and actually requested that such picture be taken and would have made such request even had the Plaintiff been there and objected. There is no evidence that any restriction was placed upon the Defendant's photographer in the use of the photographs he took at the request of the Police and Fire Marshal.

Numerous affidavits, as above set forth, have been filed by

the Defendant in support of its motion for summary judgments. All these affidavits attest to the fact that it is common usage, custom and practice for news media to enter private premises and homes to report on matters of public interest or a public event. The court therefore finds that there is no genuine issue of material fact and that as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and non-actionable when it is done under common usage, custom and practice. The court further finds that the entry complained of in Count I of the Plaintiff's complaint was one permitted by common usage, custom and practice, and that the Defendant is entitled to a summary judgment as a matter of law as to matters alleged in Count I of the Plaintiff's complaint.

As to Count III, the court must determine whether there is a genuine issue of material fact in which event Defendant's motion for summary judgment will be denied. The matters alleged in Count III are similar to those in Count I except there are allegations that the course of conduct by the Defendant's photographer were such as would not have been followed by a person of ordinary sensibilities. There were allegations of the wrongful viewing, inspecting and stepping over the child's body, wrongful taking of photographs and the wrongful publiciation of the story and photographs of the child's death, all of which it is alleged was done for the purpose of intentionally inflicting severe emotional distress upon the Plaintiff and all of which was done wilfully, unlawfully, maliciously, and wantonly and intentionally to inflict severe emotional distress or with the knowledge that severe emotional distress was substantially certain to be produced to the Plaintiff.

There are no allegations that the story and photographs as

published were false nor has there been any affidavit to controvert the Defendant's affidavits that the photographer never saw the body of the child except as it was covered by a sheet as it was being removed on the stretcher nor the affidavit of the managing editor of the Defendant's newspaper that the matter was handled in a routine way without personal animus, bias or prejudice against the Plaintiff or knowledge of the Plaintiff by the editor or to others handling the story. There was filed an affidavit by a practicing psychiatrist that a certain set of facts would have caused severe emotional distress.

There is no evidence by the depositions of the representatives of the Sheriff's or Fire Department or otherwise that the photographer acted in any way other than lawfully or properly or interfered with their task in investigating the fire.

The court has previously determined that the fire was a matter of public interest. The only recovery in an action for invasion of privacy for the publication of a story about such a public interest matter is where there is alleged and proved a calculated falsehood with the intent to harm through such falsehood.

While a story of public interest may have the effect of causing severe emotional distress or embarrassment to persons involved, the courts have consistently held that the public's right to know is of paramount importance. The media cannot be held to answer in damages for what others may call a breach of good judgment. The law is clear that only limited sanctions can be placed on the freedom guaranteed by the First Amendment. Even though the newspaper may anticipate that persons involved in the publication may suffer severe emotional distress, and desire money damages, yet under the

First Amendment a sanction may not be had which would prevent the publication. The fear of such a suit or judgment must not be a sanction which would prevent publication.

Finally, on a story of public interest and concern, the court may not review the manner in which the news media obtains its information. See *New York Times v. United States* (1971) 403 U.S. 713, the "Pentagon Papers" case, where notwithstanding the documents had been stolen (see dissent of Chief Justice Burger at 748-752), it was held that under the First Amendment the press had the right to publish.

A leading case is that of *Liberty Lobby v. Pearson* (D.C.-D.C. 1966) 261 Fed. Supp. 726, affirmed C.A.D.C. 1967, 390 Fed. 2d. 489. There Drew Pearson, the columnist, illegally obtained certain information, but the court said at 261 Fed. Supp. 726:

> "The Court is of the opinion that freedom of the press that is safeguarded by the Constitution and which is one of the basic features of American institutions, is not limited to such information as is personally obtained by newspaper men by observation or from official statements, or in any other open way. The mere fact that a newspaper man obtained information in a clandestine fashion or in a surreptitious manner or because someone unguardedly and unwittingly reveals confidential information, or even through a breach of trust on the part of a trusted employee, does not give rise to an action for an injunction. *The courts may not review the manner in which a newspaper man obtains his information and may not restrain the publication of news merely because the person responsible for the publication obtained it in a manner that may perhaps be illegal or immoral.* It would be a far-

> reaching limitation on the freedom of the press if courts were endowed with power to *review the manner in which the press obtains its information* and could restrain the publication of news that is obtained in a way that the court does not approve. If such were the law, we would not have a free press; we would have a controlled press. Such, however, is not the law."
> (Underscoring added.)

Mr. Chief Justice Burger, at that time a Judge of the Court of Appeals, spoke for a unanimous Court in affirming at 390 F. 2d. 489.

See also *Cullen v. Grove Press* (D.C.N.Y. 1967) 276 F. Supp. 727; *Time v. Geis* (D.C.N.Y. 1968) 293 Fed.Supp. 130, where the Court in headnote 9 relies on the "public interest in having the fullest information"; and *Pearson v. Dodd* (C.A.-D.C 1968) 410 F. 2d. 701, cert. den. 395 U.S. 947 (where, unlike here, there was a break in and taking of documents). We quote headnotes 8 and 9:

> "Fact that newspaper columnist received copies of documents knowing that they had been removed without authorization from office of United States senator did not render columnists liable for invasion of privacy based on intrusion."
>
> "In analyzing claimed breach of privacy, injuries from intrusion and injuries from publication should be *kept clearly separate*."

In order to causally connect the publication of a photograh and story of a matter of public interest there must be not only allegations but evidence of wrongdoing and malice which has not here been produced to oppose the affidavits of Defendant that it had no contact of any kind with the body or to

show malice. See *Kimple v. Riedel* (Fla. DCA 2 1966) So.2d 133-437. In the case at bar there is no evidence to counter the affidavit of the Defendant or to support in any way the contention that there is a genuine issue of material fact which would bar the entry of a summary judgment.

Therefore, even considering that Count III states a cause of action, which the court seriously doubts, the court finds, in the case at bar, no genuine issue of material fact and that the Defendant is entitled to a summary judgment as a matter of law.

Therefore, it is

ORDERED:

The Defendant's motion for summary judgment as to Counts I and III of the Plaintiff's complaint as amended is granted and the Plaintiff shall take nothing by this action and the Defendant shall go hence without day.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 4th day of January, A.D. 1974.

(Signed) Major B. Harding

.....

JUDGE

Copies: Harold B. Wahl, Esquire (2)
414 Florida Title Building
Jacksonville, Florida 32202

Ellis E. Neder, Jr., Esquire (2)
810 American Heritage Building
Jacksonville, Florida 32202

KLENNA ANN FLETCHER,
Appellant,

v.

FLORIDA PUBLISHING
COMPANY, a Florida
corporation,
Appellee.

Opinion filed September 10, 1975.

An Appeal from the Circuit Court for Duval County.
Major B. Harding, Judge.

Ellis E. Neder, Jr.; and Rudolph J. Inman, Jr., for Appellant.

Harold B. Wahl, of Loftin & Wahl, for Appellee.

BOYER, Chief Judge.

While appellant was absent from the State her home located in Jacksonville was severely damaged by fire. After the fire was extinguished the fire marshal and a police sergeant entered the residence accompanied by various representatives of the news media including a photographer employee of appellee. The body of appellant's seventeen-year-old daughter, clad only in underclothing, was discovered on the floor of a second-story bedroom. When the body was removed a silhouette remained on the bedroom floor. The officials, having exhausted their supply of film, requested appellee's photographer to make a picture of the silhouette, such being important to their investigation as it allegedly demonstrated that the child was on the floor of the bedroom prior to the fire. Other photographs were taken, some of which (together with the silhouette picture) were delivered

to the authorities to be made a part of their official file. The photographs were also delivered to the appellee who published in its newspaper an account of the fire together with several of the photographs including the silhouette of the child's body. Beneath the silhouette picture in large type appeared the words "Silhouette of Death." Appellant first learned the facts surrounding the tragic death of her daughter by reading the story and viewing the photographs published by the appeellee.

Appellant's amended complaint was in three counts. The first count alleged trespass and invasion of privacy; the second count alleged invasion of privacy without reference to trespass and the third count was for the wrongful intentional infliction of emotional distress, seeking punitive damages.

The learned trial judge, upon appropriate pleadings, dismissed Count II of the complaint with prejudice and granted a summary final judgment in favor of the defendant (appellee here) on Counts I and III. This appeal followed.

We will here treat each count separately and will recite such other facts as are gleaned from the record as may be found to be material to the specific point being considered.

The trial court, in its order granting the motion for summary judgment as to Count I, found that "as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and non-actionable when it is done under common usage, custom and practice" and that 'it is common usage, custom and practice for news media to enter private premises and homes to report on matters of public interest or a public event." Those findings were based upon numerous affidavits filed by the defendant in support of its motion for summary judgment.

Historically, trespass has its roots in the criminal law. However, as the law developed it became also recognized as a tort, compensible in damages.(1) Thus, at common law, every entry upon the land of another, except by consent, was trespass for which satisfaction in damages would lie.(2) There is now a clear distinction between criminal trespass and civil trespass. Among other things, the burden of proof is different as is the ultimate result upon a determination of guilt. A criminal trespass is an offense against the State or one of its political subdivisions and is punishable as such. On the other hand, one found guilty of a civil trespass responds in damages to the injured party.

In an action for civil trespass the plaintiff is always entitled to at least nominal damages,(3) and all damages of which the act of trespass was the efficient cause and for which the plaintiff is entitled to recover in any form may be recovered in such action although in point of time they did not result until sometime after the act was committed.(4)

Consent is, of course, an absolute defense to an action for trespass provided the consent is given by the possessor of the land or one competent and authorized to give such consent and provided further that the acts of the party ac-

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(1) Leonard v. Nat Harrison Associates, Inc., Fla. App. 2nd 1960, 122 So.2d 432.

(2) See Harris v. Baden, Sup. Ct. Fla. 1944, 154 Fla. 373, 17 So.2d 608, wherein the Court said: "At the common law, every entry upon another's land, except by consent, was deemed a trespass for which satisfaction would lie. Every man's land was considered, as a matter of law, to be enclosed and set apart from his neighbor's, either by a visible and material fence or by an ideal invisible boundary existing only in contemplation of the law. * * *"

(3) Leonard v. Nat Harrison Associates, Inc., supra.

(4) 52 Am.Jur., Trespass, §47 and cases there cited.

cused of the trespass do not exceed, or are not in conflict with, the purposes for which such consent was given.(5)

The defense of common custom and usage is but another way of expressing consent by implication; that is, consent may be implied from custom, usage or conduct.(6) However, consent to an entry on property by a person named cannot be extended by inference to justify the unlicensed entry of others,(7) and while permission to go upon the premises of another may be implied from custom, usage or conduct, such implied consent is necessarily limited to those acts which are within a fair and reasonable interpretation of the terms of the grant.(8) In order for custom and usage to constitute implied consent to a trespass the custom and usage must have been at the acquiescence of the possessor or others similarly situated. As an example, the opening of an office to transact business with the public is a tacit invitation to all persons having business with the proprietor, and a permission to others to enter the place of business. Further, unless a home owner manifests externally in some way his or her wish to remain unmolested by the visits of solicitors seeking orders for merchandise, a solicitor may take custom and usage as implied consent to call where such custom and usage exists.(9) In the absence of some external indication to the contrary, custom and usage would render unactionable a trespass on the

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(5) Restatement of the Law of Torts, Chapter 8, §167, et seq.

(6) Restatement of the Law of Torts, Chapter 8, §167, Comment d.; 52 Am.Jur., Trespass, §39.

(7) 52 Am.Jur., Trespass, §39 and cases there cited.

(8) Boston Manufacturers Mut. Ins. Co. v. Fornalski, Fla. App. 4th 1970, 234 So.2d 386, and authorities therein cited.

(9) 52 Am.Jur., Trespass, §39 and cases there cited. See also Prior v. White, Sup. Ct. Fla. 1938, 180 So. 347; Martin v. Struthers, US. S.Ct. 1943, 319 U.S. 141, 87 L.Ed. 1313.

premises of another for the purpose of a social visit, retrieving young children who had wandered away or to seek the assistance of the possessor at a time of emergency.(10) Thre are unquestionably other instances in which consent will be implied based on common custom, usage and conduct: The foregoing examples are merely by way of explanation, and are not intended to be inclusive.

Appellee relies heavily upon Prior v. White, supra. However, it is readily apparent that that case has no application to the facts sub judice. There the Supreme Court of Florida had for consideration the constitutionality of a municipal ordinance declaring solicitation "in and upon private residences" a nuisance, constituting a misdemeanor punishable by fine or imprisonment. The Supreme Court there simply held that such solicitation was not a nuisance, either private or public, and that it did not have any relation to the public health, safety, or general welfare of the community, (a requisite basis for assertion of the police power) emphasizing that "where the householder permits solicitors, the city cannot forbid." Quoting 2 Cooley on Torts, 4th Ed., page 238, §248, the Court said:

> "'Every retail dealer impliedly invites the public to enter his shop for the examination of his goods, that they may purchase them if they see fit; the mechanic extends the like invitation to those who may have occasion to become his customers; the physician and the lawyer invite them to their respective offices, and so on * * * No doubt one may visit another's place of business from no other motive than curiosity, without

(10) Boston Manufacturers Mutual Insurance Company v. Fornalski, supra.

> incuring liability, unless he is warned away by placard or otherwise. *So every man, by implication, invites others to come to his house as they may have proper occasion, either of business, or courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation.*"
> (180 So. 355; emphasis the Court's)

Declaring the offending ordinance unconstitutional the Supreme Court emphasized that the defendant, a Fuller Brush salesman, though going *to* the home in question without express invitation, remained at the implied invitation of the occupant who placed orders for the merchandise which he was selling. Entry of the home of another without invitation was not an issue in Prior v. White.

Neither is State v. Blocker(11) of any help. First, that opinion is the opinion of a single judge of the County Court of Dade County, and therefore not binding by the doctrine of stare decisis upon this Court. Second, in that case the defendant newsman, who was being prosecuted *criminally*, did not go *into* the residence of the prosecuting witness. The holding of that opinion is summed up in the second sentence thereof: "Joel Blocker did approach Mr. Fernandez's house, go on to his property and knock on the door, but this activity was not extraordinary and is permitted by custom. See Prior v. White, 132 Fla. 1, 180 So. 347, 356 (1938)." (39 Fla. Supp. 138) In short, the defendant there went *to* the front door of the home of the prosecuting witness. He did not go *in*. Prior v. White, supra, was properly cited as a precedent for the granting of the order of dismissal in that case. Such are not the facts sub judice.

(11) 39 Fla. Supp. 136 (1973)

McKee v. Gratz[12] is also distinguishable upon the same basis. That case involves a trespass upon unenclosed land in reliance upon implied consent by custom and usage, not an intrusion into a private dwelling.

In Martin v. Struthers,[13] the United States Supreme Court had occasion to consider an ordinance, similar to the ordinance involved in Prior v. White, supra. There the appellant was convicted in the Mayor's Court and fined for violating an Ordinance which declared it unlawful for any person to distribute handbills, circulars or other advertisements, to ring the doorbell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements. Holding that the ordinance was violative of the Federal Constitution's guarantee of free speech and the press the Supreme Court said:

> "* * * Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. * * * " (87 L. Ed. at page 1316)

Recognizing the distinction between criminal trespass and civil trespass the writer of the opinion further said:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. *** We know of no

(12) U.S. S.Ct. 1922, 260 U.S. 127, 67 L.Ed. 167

(13) U.S. S. Ct. 1943, 319 U.S. 141, 87 L.Ed. 1313

> state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another without an explicit command from the owners to stay away. * * *"
> (87L.Ed. 1319)

There is nothing in Martin v. Struthers relating to damages for a civil trespass as distinguished from a fine for criminal trespass. Neither does it involve an entry *into* a house. It is in every regard very similar to Prior v. White.

Pearson v. Dodd,[14] is cited as authority for appellee's position here. However, the facts are readily distinguishable. In that case former employees of Senator Dodd, neither of whom were parties to the suit, with the assistance of two members of his staff, entered his office without authority, removed various documents from his files, made copies of them, replaced the originals and turned over the copies to columnist Jack Anderson who was then associated with columnist Drew Pearson. The defendants Pearson and Anderson thereafter published articles containing information gleaned from those documents. The court emphasized that neither Anderson nor Pearson has trespassed upon Dodd's premises although they were aware that the documents had been removed without authorization. Under those circumstances the court said:

> " * * * If we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far. * * * " (410 F.2d 705)

(14) 410 F.2d 701 (D.C. Cir. 1969)

The court thereupon concluded:

> " * * * Since we have also concluded that appellants' role in obtaining the information *did not make them liable to appellee for intrusion,* their subsequent publication, inself no invasion of privacy, cannot reach back to render that role tortious." (410 F.2d 706; emphasis added)

It is apparent from the language emphasized in the foregoing quote that had the appellants' role in obtaining the information constituted actionable trespass then the decision would have been contra. Indeed, the court appeared to have anticipated this very case when it said:

> " * * * But in analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate. *Where there is intrusion, the intruder should generally be liable* whatever the content of what he learns. * * * " (410 F.2d 705; emphasis added)

New York Times Co. v. United States,(15) the infamous Pentagon Papers case, has no application at all to the case sub judice. The sole holding of the several separate opinions constituting that case is that an injunction against the publication by the newspaper of information wrongfully obtained will not be enjoined. No such issue is here involved.

Both parties cite Cantrell v. Forest City Publishing Co.(16) In that case a mother and son brought a diversity action

(15) 403 U.S. 713, 29 L.Ed. 822, 91 S.Ct. 2140

(16) (6th Cir. 1973) 484 F.2d 150, certiorari granted and case reversed by the Supreme Court of the United States, Cantrell v. Forest City Publishing Co., (S.Ct. 1974) 95 S.Ct. 465.

against a newspaper publisher, a photographer and a reporter, claiming that a feature story in the newspaper discussing the impact upon their family of the death of their father in a bridge collapse, which story contained several admitted inaccuracies and false statements about the family, entitled them to compensatory and punitive damages under the "false light" theory of invasion of privacy. The United States district Judge entered judgment on the jury's verdict awarding damages and the Court of Appeals reversed. The United States Supreme Court granted certiorari, holding that the evidence was insufficient to support the jury's verdict against the photographer but that the judgment based upon the jury verdicts should have been sustained as to the reporter and publisher. The action was bottomed on the "false light" theory of invasion of privacy and not upon trespass. In that manner it differed from the action sought to be asserted in Count I of the plaintiff's complaint sub judice. The Circuit Court observed that there was little evidence as to whether the reporter and photographer were invited into the plaintiff's home. One of the plaintiff's children testified that one had asked them in and that no one had asked them to get out. He further testified that the door was open "because the men were coming." The court observed:

> "On appeal the appellees attempt to treat the entry of the two defendants into their home without an invitation when only children were present as the intrusion for which damages were justified. However, this was not the theory on which the case was tried in the District Court." (484 F.2d 153)

In reversing the judgments the Court of Appeals said:

> " * * * The two newsmen may have been guilty of trespass against the property of the Cantrells. How-

> ever, the gravamen of this action lies in the claim that the publication of the article, not the physical intrusion, damaged the plaintiffs. * * * "
> (484 F.2d 154-155)

On certiorari, the United States Supreme Court reversed the Court of Appeals as to the reporter and publisher, reinstating the judgments against them. In so doing, it did not disturb those portions of the opinion of the Court of Appeals above quoted but, instead, specifically recited that "the case went to the jury on a so-called 'false light' theory of invasion of privacy. In essence, the theory of the case was that by publishing the false feature story about the Cantrells thereby making them objects of pity and ridicule, the respondents damaged Mrs. Cantrell and her son William * * *".

It is abundantly clear therefore that the Cantrell v. Forest City Publishing Co. decisions have no effect upon a case bottomed on actual trespass.

Cases have been found wherein custom and usage was construed to imply consent to enter *onto* business property and *into* business establishments.(17) Cases have also been found wherein custom and usage was construed to imply consent for entering *onto* the private residential property of another.(18) However, no case has been cited to us by counsel, nor has independent research revealed any, in which consent by custom and usage was held to have authorized

(17) Please see citations in footnotes 6, 7, 8, 9, 10 and 11 above.

(18) Boston Manufacturers Mutual Insurance Co. v. Fornalski, supra; State v. Blocker, supra; Prior v. White, supra.

entry *into* the private dwelling of another.(19)

The law is so well established as to render citations superfluous that "every man's home is his castle". Even the law applicable to searches and seizures incident to the commission of crimes differs as to whether the property involved is a residence or some other type of property.(20)

Sub judice, it is clear that appellant did not either impliedly or expressly invite appellee's employees into her home; nor is there anything in the record to indicate that appellant (nor others like situated) had theretofore acquiesced in other

(19) The facts recited in Prior v. White, supra, reveal that there the court was not considering an entry *into* a residence. The entire transaction which gave rise to the appellant's prosecution under the ordinance which was decreed unconstitutional took place on the porch of the prosecuting witness and not inside her home. By way of dicta the court there stated "it has been held that a license may be implied to entered the house of another, at usual and reasonable hours, and in a customary manner for any of the common purposes of life" citing Lakin v. Ames, 10 Cush., Mass., 198 and Section 167 of the Restatement of Torts. The only portion of Section 167 of the Restatement of Torts which can possibly be construed to relate to entries *into* (as distinguished from *upon*) the residence of another is the statement that upon *"the possessor's* failure to object to a particular entry, or *his* acquiescence to similar entries on previous occasions, may lead the actor reasonably to believe that the possessor is willing that he shall enter the *land."* (Emphasis added) There, it will be noted, it is the *possessor's* failure to object that leads to consent by custom not the failure of some remote third party to object. Examination of Lakin v. Ames reveals that entry into a residence was not there involved. In that case the defendant had removed a shed built by the plaintiff on the town common which shed interferred with the plaintiff's access to his family burial tomb. The court simply held that there was no trespass, and gratuitously by way of dictum added "thus it has been held that the entry upon another's close or into his house, at usual and reasonable hours, and in a customary manner, for any of the common purposes of life, cannot be regarded as trespass." (10 Cush. Mass. 220) No authorities for that statement were cited and the statement had nothing to do with the facts of that case.

(20) Dunnavant v. State, Sup. Ct. Fla. 1950, 46 So.2d 871; See also Swartz, Woodrum and Haynes v. State, Case No. U-119, opinion filed July 14, 1975.

persons coming into her home: Therefore there was no basis for the establishing of an implied consent by custom and usage. Though it is conceded by appellant that the fire marshal and police rightfully entered the premises for the purpose of discharging their official duties, there is nothing to indicate that those officials had, in the absence of an emergency, authority to invite others to do so. The fire had been extinguished prior to the entry complained of. The emergency was over. There is no contention that appellee's employee went into the premises for the purpose of rendering assistance to the occupants nor to the officials. The established fact that photographs were taken by appellee's employee at the request of the authorities *after* the entry has no effect on the alleged initial trespass which would have occurred when appellee's employee crossed the threshold of appellant's home. Under the authorities above cited, in the light of the affidavits filed by appellee in support of its motion for summary judgment, custom and usage implied consent to go *onto* the yard of appellant's home and up to the front door: However, the proofs before the trial court were not sufficient to show that there was no genuine issue as to he very material fact as to whether implied consent by custom and usage authorized entry *into* the premises, without invitation by appellant or someone authorized by her.

While custom and usage are matters of fact which may properly be alleged in affidavits in support of, or in opposition to, motions for summary judgment, the legal effect of such facts are matters of law to be resolved by the courts. As a matter of law the implication of consent by custom and usage to go onto and into business premises, or onto a yard or enclosure surrounding a residence, or onto the entrance of that residence does not extend to an implied consent to proceed into the dwelling place. If custom and usage are

to be relied upon as implying consent to enter into a dwelling place, after an emergency has subsided, as distinguished from entering onto a yard or a porch or into a common hallway, then the proofs must relate to that specific point. Affidavits reciting custom and usage as to emergency situations, or as to customary conduct involving exterior portions of a private dwelling may not be extended to include the interior. Said another way, although custom and usage may be relied upon as implying consent to enter *into* a private dwelling after an emergency has subsided, the proofs of such custom and usage must establish that specific fact, otherwise an issue is presented to be resolved by a trier of fact.

As far back as 1961 this Court recognized the right to recover damages for invasion of privacy in a negligence action. (21) Allowance of such damages as an incident to a trespass is no extension of that doctrine.

Dietemann v. Time, Inc.(22) involves a factual situation so analogous to that sub judice that we feel justified in quoting extensively therefrom. Indeed, to paraphrase rather than to quote would serve only to lengthen this opinion. There the plaintiff, appellee, was engaged in the practice of healing with clay, minerals and herbs for which he made no charges, but did accept donations. Time, Inc. entered into an arrangement with representatives of the District Attorney's office whereby Time's employees would visit Dietemann at his home and obtain facts and pictures concerning his activities. They gained entrance to the plaintiff's home through a

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(21) See Thompson v. City of Jacksonville, Fla. App. 1st 1961, 130 So.2d 105)

(22) 449 F.2d 245 (9th Cir. 1971)

ruse, took pictures by use of a secret camera, and carried on conversations which were transmitted by a hidden radio transmitter to a tape recorder in a parked automobile outside occupied by other employees of Time and an investigator of the State Department of Public Health. The plaintiff was thereafter arrested at his home on a charge of practicing medicine without a license, at which time many pictures were made by employees of Time of plaintiff and his home. Also present were newspaper men who had also been invited by the officials to be present at the time of the arrest. Time, Inc. published a magazine article concerning Dietemann together with various photographs. Suit was filed alleging an invasion of privacy which resulted in a judgment for damages. In affirming the judgment the Court of Appeals said:

> "The appeal presents three ultimate issues: (1) Under California law, is a cause of action for invasion of privacy established upon proof that defendant's employees, by subterfuge, gained entrance to the office portion of plaintiff's home wherein they photographed him and electronically recorded and transmitted to third persons his conversation without his consent as a result of which he suffered emotional distress? (2) Does the First Amendment insulate defendant from liability for invasion of privacy because defendant's employees did those acts for the purpose of gathering material for a magazine story and a story was thereafter published utilizing some of the material thus gathered? (3) Were the defendant's employees acting as special agents of the police and, if so, did their acts violate the First, Fourth, and Fourteenth Amendments of the Federal Constitution, thereby subjecting defendant to liability under the Civil Rights Act (42 U.S.C. §1983)? Because we hold that plaintiff, proved

> a cause of action under California law and that the First Amendment does not insulate the defendant from liability, we do not reach the third issue. (449 F.2d at page 247)
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> • • •
>
> "In jurisdictions other than California in which a common law tort for invasion of privacy is recognized, it has been consistently held that surreptitious electronic recording of a plaintiff's conversation causing him emotional distress is actionable. Despite some variations in the description and the labels applied to the tort, there is agreement that publication is not a necessary element of the tort, that the existence of a technical trespass is immaterial, and that proof of special damages is not required. [Numerous citations omitted] (449 F.2d at page 247)
>
> "Although the issue has not been squarely decided in California, we have little difficulty in concluding that clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his emotional distress warrants recovery for invasion of privacy in California. California began developing a common law privacy tort in 1931 with the decision of Melvin v. Reid, 112 Cal. App. 285, 297 P. 91. Since then, the California Supreme Court has decided a number of privacy cases in some of which there are indications that California would recognize the plaintiff's claim. (449 F.2d at 248)
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> • • •
>
> "• • • The First Amendment has never been construed to accord newsmen immunity from torts or crimes

committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to intrusion is reasonably suspected of committing a crime." [Numerous citations omitted] (449 F.2d at page 249)

* * *

"Defendant relies upon the line of cases commencing with New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 and extending through Rosenbloom v. Metromedia, Inc. (1971) 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) to sustain its contentions that (1) publication of news, however tortiously gathered, insulates defendant from liability for the antecedent tort, and (2) even if it is not thus shielded from liability, those cases prevent consideration of publication as an element in computing damages." (449 F.2d at page 249)

* * *

"As we have previously observed, publication is not an essential element of plaintiff's cause of action. Moreover, it is not the foundation for the invocation of a privilege. Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication. (Cf. Nimmer, 'The Right to Speak from Time to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 Calif. L. Rev. 935, 947.) Nothing in *New York Times* or its progeny suggests anything to the contrary. Indeed, the

Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds. E.g., Time, Inc. v. Hill, supra, 385 U.S. at 389-390 and 384 n. 9.)" (449 F.2d at pages 449 and 450)

"No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed. The same rule would encourage conduct by news media that grossly offends ordinary men.

"The judgment is affirmed." (449 F.2d at page 250)

Unquestionably the fire in appellant's home coupled with the tragic death of her daughter was of obvious legitimate public interest. That the published matter complained of is of general public interest has always been considered a defense to a claim of invasion of privacy by publication. Finding that the matter published was of obvious legitimate public interest, the publication, per se, was not an invasion of privacy.(23) However, if the entry by appellee's employees into appellant's home constituted a trespass or "intrusion" it fol-

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(23) Pearson v. Dodd, supra.

lows that such intrusion constituted a sufficient basis for the tort of invasion of privacy, entitling the injured party (appellant here) to such damages incident to the trespass action as may be proved to have resulted therefrom.(24) As stated in Pearson v. Dodd:

> "We approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded. Just as the Fourth Amendment has expanded to protect citizens from government intrusions where intrusion is not reasonably expected, so should tort law protect citizens from other citizens. The protection should not turn exclusively on the question of whether the intrusion involves a technical trespass under the law of property. The common law, like the Fourth Amendment, should 'protect people, not places.'" (410 F.2d 701 at page 704)

We do not here hold that a trespass or "intrusion" did in fact occur sub judice: We simply find that such is alleged in Count I of the amended complaint and that the proofs before the learned trial judge were insufficient to resolve the point by summary judgment.

Count I of the amended complaint seeks punitive damages in addition to compensatory. Punitive damages are, of course, properly recoverable when the requisite elements are pres-

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(24) Pearson v. Dodd, supra; 52 Am.Jur., Trespass, §47, and cases therein cited.

ent.(25) Although not unambiguously, the Supreme Court of the United States in Cantrell v. Forest City Publishing Co.(26) distinguished between "actual malice" as established in New York Times Co. v. Sullivan(27) and the commonlaw standard of "malice" required to support an award of punitive damages. In our view the Supreme Court intended to hold in Cantrell v. Forest City Publishing Co. that under factual situations as alleged sub judice the commonlaw standard is applicable. Being so, it is apparent from a reading of the first count of the amended complaint that plaintiff's *allegations* met the tests of the auhorities above mentioned. However, it is equally apparent that in responding to the defendant's motion for summary judgment the plaintiff did not rebut by facts under oath the negative allegations of fact contained in the defendant's affidavits.(28) Accordingly although we here recognize that punitive damages are recoverable in a proper case for trespass resulting in an invasion of privacy, we find from the record before us that the learned trial judge did not err in granting a motion for summary judgment in favor of the defendant on the issue of punitive damages in the case sub judice.

As to Count II of appellant's complaint, a careful reading thereof reveals that it is no more than a reiteration of the allegations contained in Count I, absent the allegation of trespass. There is no allegation of falsity or defamation. Nei-

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(25) Winn & Lovett Grocery Co. v. Archer, Sup. Ct. Fla. 1936, 171 So. 214; Cason v. Baskin, Sup. Ct. Fla. 1947, 30 So.2d 635; Buie v. Barnett First National Bank of Jacksonville, Sup. Ct. Fla. 1972, 266 So.2d 657; Campbell v. Government Employees Insurance Co., Sup. Ct. Fla. 1974, 306 So.2d 525, reh. den. Feb. 13, 1975.

(26) Supp. Ct. Fla. 1974, 95 S.Ct. 465.

(27) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 686

(28) Rule 1.510 RCP

ther are there any allegations sufficient to bring that count within the ambit of Cantrell v. Forest City Publishing Co., supra. There is nothing in the allegations of that count, nor does there appear anything in the record-on-appeal, to suggest that by further amendments the count could be amended to state a cause of action for any claim not encompassed by the allegations of Count I. It follows that the learned trial judge was eminently correct in dismissing Count II with prejudice.

We now turn to a consideration of Count III of appellant's amended complaint which count seeks damages, compensatory and punitive, for an alleged intentional infliction of emotional distress. Such an action has long been recognized in Florida and elsewhere.(29) To sustain such an action the complaint must allege conduct exceeding all bounds that could be reasonably tolerated by society of a nature especially calculated to cause severe emotional distress to a person of ordinary sensibilities and the wrongful act alleged must be such as to reasonably imply malice or be such that, from the entire want of care or attention to duty or great indifference to the person, property or rights of others, such malice may be imputed as would justify assessment of exemplary or punitive damages. The wrongful act giving rise to the cause of action must also have been done intentionally or in reckless disregard of the rights of others.

Although we find that the allegations of Count III of the amended complaint sub judice were such as to meet the re-

(29) Kirksey v. Jernigan, Sup. Ct. Fla. 1950, 45 So.2d 188; Korbin v. Berlin, Fla. App. 3rd 1965, 177 So.2d 551; Kimple v. Riedel, Fla. App. 2nd 1961, 133 So.2d 437; LaPorte v. Associated Independent, Inc., Sup. Ct. Fla. 1964, 163 So.2d 267; 32 Fla. Jur., Torts, §15; Restatement of the Law of Torts, 2nd Ed., §46, 312.

quirements above mentioned, there is nothing in the record-on-appeal to support the allegations. On the contrary, the affidavits filed in support of the motion for summary judgment negated the allegations of Count III in that regard, and those affidavits were not rebutted. No issue of material fact having been demonstrated as to the allegations of Count III of the amended complaint, the learned trial judge was eminently correct in entering summary judgment thereon in favor of the defendant, appellee here.(30)

In summary, we reverse as to compensatory damages as alleged in Count I and affirm as to punitive damages alleged in that count. We further affirm as to dismissal of Count II and the summary judgment as to Count III.

Remanded for further proceedings consistent herewith.

RAWLS, J., CONCURS; McCORD, J., DISSENTS.

McCORD, J. (Dissenting)

I disagree with the ruling of the majority opinion that the news photographer, in entering the burned home, was a trespasser, and that, thus, the photograph published by appellee and the news story resulting from the entry were an actionable invasion of privacy. The only photographs taken and published were of fire damage - none were of deceased or injured persons. There is no contention that the particular photograph complained of (the silhouette picture) and the news story were in any way false or inaccurate. There could, therefore, be no recovery under the "false-light" doctrine of invasion of privacy. See Cantrell v. Forest City Publishing

(30) See Kimple v. Riedel, supra.

Company, ... U.S. ....., 95 S.Ct. 465, 42 L.Ed.2d 419 (1974). Thus, there could be no recovery from the publication if the same photograph had come from a source other than from the news photographer's entry upon the premises. Any recovery in this case must necessarily be based upon trespass, and, therefore, the only question is whether or not there was a trespass by the news photographer. The majority opinion discusses the implied consent doctrine under which a person, who does not have express consent from the owner or possessor of premises, may legally enter under circumstances which infer or imply consent (common usage, custom and practice). It is my view that the entry in this case was by implied consent.

It is not questioned that this tragic fire and death were being investigated by the fire department and the sheriff's office and that arson was suspected. The fire was a disaster of great public interest and it is clear that the photographer and other members of the news media entered the burned home at the invitation of the investigating officers. (Numerous members of the general public also went through the burned house.) Many affidavits of news editors throughout Florida and the nation and affidavits of Florida law enforcement officials were filed in support of appellee's motion for summary judgment. These affidavits were to the general effect that it has been a long-standing custom and practice throughout the country for representatives of the news media to enter upon private property where disaster of great public interest has occurred--entering in a peaceful manner, without causing any physical damage, and at the invitation of the officers who are investigating the calamity. The affidavits of law enforcement officers indicate that the presence of the news media at such investigations is often helpful to the investigations in developing leads, etc.

The affidavits as to custom and practice do not delineate between various kinds of property where a tragedy occurs. They apply to any such place. If an entry is or is not a trespass, its character would not change depending upon whether or not the place of the tragedy is a burned out home (as here), an office or other building or place. An analysis of the cases on implied consent by custom and usage, indicates that they do not rest upon the previous non-objection to entry by the particular owner of the property in question but rest upon custom and practice generally. Implied consent would, of course, vanish if one were informed not to enter at that time by the owner or possessor or by their direction. But here there was not only no objection to the entry, but there was an invitation to enter by the officers investigating the fire. The question of implied consent to news media personnel to enter premises in a circumstance such as this appears to be one of first impression not only in this jurisdiction but elsewhere. This, in itself, tends to indicate that the practice has been accepted by the general public since it is a widespread practice of long standing. Due to such widespread and long-standing custom, reason and logic support the application of implied consent to enter the premises in the case before us. It, therefore, was not a trespass, and I would affirm the trial court.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1976

FLORIDA PUBLISHING COMPANY,
a Florida corporation,
Petitioner (Defendant),

v.

KLENNA ANN FLETCHER, ETC.
Respondent (Plaintiffs).

CASE NO. 48,372

DCA CASE NO. V-101

Opinion filed October 7, 1976

Writ of Certiorari to the District Court of Appeal, First District

ROBERTS, J.

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, First District, in *Fletcher v. Florida Publishing Co.*, reported at 319 So.2d 100 (Fla. App. 1, 1975), which directly conflicts with *Jacova v. Southern Radio and Television Co.*, 83 So.2d 34 (Fla. 1955), thereby vesting jurisdiction in this Court pursuant to Article V, Section 3(b)(3), Florida Constitution.

The facts supported by the record are succinctly stated in the summary final judgment of the trial judge who determined that there was no real dispute as to the material facts. Respondent, Mrs. Fletcher, left Jacksonville for New York on September 15, 1972, to visit a friend. She left in Jacksonville her three young daughters, including seventeen-year-old Cindy.

A "baby sitter" was to spend the nights with the children, but there was no one with them in the home during the daytime except a young man who had a room in the house and whom Mrs. Fletcher described as Cindy's "boy friend." On the afternoon of September 15, 1972, while Cindy was alone in the house, a fire of undetermined origin did large damage to the home, and Cindy died.

The fire and police departments were called by a neighbor who discovered the fire, but too late to save the child. A large group of firemen, news media representatives, and onlookers gathered at the scene and on Mrs. Fletcher's property.

When the Fire Marshal and Police Sergeant Short entered the house to make their official investigation, they invited the news media to accompany them, as they deposed was the standard practice. The media representatives entered through the open door; there was no objection to their entry; they entered quietly and peaceably; they did no damage to the property; and their entry was for the purpose of their news coverage of this fire and death.

The Fire Marshal desired a clear picture of the "silhouette" left on the floor after the removal of Cindy's body. He and Sergeant Short in their depositions explained that the picture was important for their respective investigations to show that the body was already on the floor *before* the heat of the fire did any damage to the room. The Fire Marshal took one polaroid picture of the silhouette, but it was not too clear, he had no further film, and he requested photographer Cranford to take the "silhouette" picture which was made a part of the official investigation file of both the Fire and Police.

This picture was not only a part of the investigation but News Photographer Cranford turned it and his other pictures

over to the defendant newspaper. It and several other pictures appeared in the news story of The Florida Times-Union on September 16, 1972.

Respondent first learned of the facts surrounding the death of her daughter by reading the newspaper story and viewing the published photographs.

Respondent filed an amended complaint against petitioner alleging (1) trespass and invasion of privacy, (2) invasion of privacy, (3) wrong intentional infliction of emotional distress - seeking punitive damages.

The trial court dismissed Count II and granted final summary judgment for petitioner as to Counts I and III. Relative to the granting of summary judgment for Petitioner as to Count I, the trial judge cogently explicated:

> "As to Count I, the question raised by the motion for summary judgment is one of law as there is no genuine issue of material fact. The question raised is whether the trespass alleged in Count I of the complaint was consented to by the doctrine of common custom and usage.
>
> "The law is well settled in Florida and elsewhere that there is no unlawful trespass when peaceable entry is made, without objection, under common custom and usage. See *Prior v. White* (1938) 132 Fla. 1, at 19, 180 So. 347; *Boston v. Fornalski* (Fla. DCA 4, 1970) 234 So.2d. 386, 387; 52 Am. Jur., Trespass, Section 39; 87 C.J.S., Trespass, Section 49b; Conley on Torts (4th Edition) Sections 251 and 248; Harper and James on Torts, Section 1.11; Restatement of the Law of Torts, Section 167 (d), Trespass, page 403.

> "In *Martin v. Struthers* (1943) 318 U.S. 141, 149, the Court struck down an unconstitutional and 'invalid in conflict with the freedom of speech and press' a city ordinance which made it unlawful trespass to knock on doors and ring doorbells to distribute literature. In so doing, at pages 147-149 it made the far reaching pronouncement followed by the Florida Supreme Court in *Prior v. White* (Fla. 1938) 132 Fla. 1, 180 So. 347, 356:
>
> > "'Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. *** We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.'
>
> "In *McKee v. Gratz* (1922) 262 U.S. 127, the Supreme Court recognized the rule that it was not trespass when under the 'habits of the country' entry was commonly made.
>
> * * * * * * * *
>
> "Not only did the Fire Marshal and Detective Sergeant Short testify it was common custom and usage to permit the news media to enter under the circumstances here, and of the great number of times they had permitted it in private homes, but many affidavits were filed to the same effect, including those of Duval County Sheriff Carson and Florida Attorney General Shevin.
>
> "Similar affidavits have been filed from the Chicago Tribune; the ABC-TV News, New York; the Tallahas-

see Democratic; the Pensacola Journal; the Associated Press; the President of the American Newspaper Publishers Association; the President of the Radio Television News Directors Association; the Miami Herald; United Press International; The Florida Times-Union and Jacksonville Journal; The Washington Post; TV-12 at Jacksonville; TV-10 at Miami; TV-4 at Jacksonville; the New York Daily News; the Milwaukee Journal; the Birmingham Post-Herald; the Memphis Commercial Appeal; the Macon Telegraph; and the Tampa Tribune; all attesting that it is common usage, custom and practice for news media to enter private premises and homes under circumstances like those here.

"Plaintiff filed no affidavits except her own; she makes no attempt to qualify as an expert; and she simply states her personal belief generally, without going into the situation involving coverage of a news story of public interest. She shows no qualifications to make an affidavit on the custom and usage in such matters.

"In Mrs. Fletcher's deposition, she stated she was in New York at the time of the fire; there was no one at the scene who objected to the entry; and she makes it clear she does not contend there was any force used for entry, or any physical damage done to the premises.

"Plaintiff likewise concedes that it was perfectly proper for the Fire and Police to enter without permission. The Fire and Police used the picture as part of their official investigation and actually requested that such picture be taken and would have made such request even had the Plaintiff been there and objected. There is no evidence that any restriction was

placed upon the Defendant's photographer in the use of the photographs he took at the request of the Police and Fire Marshal.

"Numerous affidavits, as above set forth, have been filed by the Defendant in support of its motion for summary judgments. All these affidavits attest to the fact that it is common usage, custom and practice for report on matters of public interest or a public event. The court therefore finds that there is no genuine issue of material fact and that as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and non-actionable when it is done under common usage, custom and practice. The court further finds that the entry complained of in Count I of the Plaintiff's complaint was one permitted by common usage, custom and practice, and that the Defendant is entitled to a summary judgment as a matter of law as to matters alleged in Count I of the Plaintiff's complaint."

On appeal, the District Court of Appeal reversed as to the granting of summary judgment on Count I, stating:

> "We do not here hold that a trespass or 'intrusion' did in fact occur sub judice. We simply find that such is alleged in Count I of the amended complaint and that the proofs before the learned trial judge are insufficient to resolve the point by summary judgment."

Although recognizing that consent is an absolute defense to an action for trespass and that the defense of custom and usage is but another way of expressing consent by implication - that is consent may be implied from custom, usage or conduct - the District Court commented that the emergency

of the fire was over and that there was no contention that petitioner's employees entered the premises to render assistance, explained that respondent did not either impliedly or expressly invite petitioner's employees into her home, and concluded that the proofs before the court were not sufficient to show that there was no genuine issue of material fact as to whether implied consent by custom and usage authorized entry into the premises without invitation by appellant.

As to the other points on appeal, the District Court of Appeal, First District, determined that although punitive damages are recoverable in a proper case for trespass resulting in invasion of privacy, the trial judge did not err in granting summary judgment for petitioner on issue of punitive damages, held that the trial court correctly dismissed Count II with prejudice, and correctly granted summary judgment for petitioner as to Count III.

The District Court erred in reversing summary judgment for petitioners as to Count I. The trial court properly determined from the record before it that there was no genuine issue of material fact insofar as the entry into respondent's home by petitioner's employees became lawful and non-actionable pursuant to the doctrine of common custom, usage, and practice and since it had been shown that it was common usage, custom and practice for news media to enter private premises and homes *under the circumstances present here.*

Judge McCord in his dissenting opinion could not agree with the majority that the news photographer who entered the burned out home was a trespasser or that the photograph published by petitioner and the news story resulting from the entry were an actionable invasion of privacy. We agree with and approve the following well-reasoned explication by

Judge McCord in his dissenting opinion:

> "The only photographs taken and published were of fire damage--none were of deceased or injured persons. *There is no contention that the particular photograph complained of (the silhouette picture) and the news story were in any way false or inaccurate.* There could, therefore, be no recovery under the 'false-light' doctrine of invasion of privacy. *See Cantrell v. Forest City Publishing Company,* 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974). Thus, there could be no recovery from the publication if the same photograph had come from a source other than from the news photographer's entry upon the premises. Any recovery in this case must necessarily be based upon trespass, and, therefore, the only question is whether or not there was a trespass by the news photographer. The majority opinion discusses the implied consent doctrine under which a person, who does not have express consent from the owner or possessor of premises, may legally enter under circumstances which infer or imply consent (common usage, custom and practice). *It is my view that the entry in this case was by implied consent.*
>
> "It is not questioned that this tragic fire and death were being investigated by the fire department and the sheriff's office and that arson was suspected. The fire was a disaster of great public interest and it is clear that the photographer and other members of the news media entered the burned home at the invitation of the investigating officers. (Numerous members of the general public also went through the burned house.) Many affidavits of news editors throughout Florida and the nation and affidavits of Florida law enforcement officials were filed in support of appellee's

motion for summary judgment. These affidavits were to the general effect that it has been a long-standing custom and practice throughout the country for representatives of the news media to enter upon private property where disaster of great public interest has occurred--entering in a peaceful manner, without causing any physical damage, and at the invitation of the officers who are investigating the calamity. The affidavits of law enforcement officers indicate that the presence of the news media at such investigations is often helpful to the investigations in developing leads, etc.

"The affidavits as to custom and practice do not delineate between various kinds of property where a tragedy occurs. They apply to any such place. If an entry is or is not a trespass, its character would not change depending upon whether or not the place of the tragedy is a burned out home (as here), an office or other building or place. An analysis of the cases on implied consent by custom and usage, indicates that they do not rest upon the previous nonobjection to entry by the particular owner of the property in question but rest upon custom and practice generally. Implied consent would, of course, vanish if one were informed not to enter at that time by the owner or possessor or by their direction. But here there was not only no objection to the entry, but *there was an invitation to enter by the officers investigating the fire.* The question of implied consent to news media personnel to enter premises in a circumstance such as this appears to be one of first impression not only in this jurisdiction but elsewhere. This, in itself, tends to indicate that the practice has been accepted by the

general public since it is a widespread and long-standing. Due to such widespread and long-standing custom, reason and logic support the application of implied consent to enter the premises in the case before us. It, therefore, was not a trespass, and I would affirm the trial court."
(emphasis supplied)

Accordingly, that portion of the decision of the District Court of Appeal, First District, reversing summary judgment for petitioner as to Count I is quashed, and the cause is remanded for further proceedings consistent herewith.

It is so ordered.

OVERTON, C.J., ADKINS, BOYD and HATCHETT, JJ., Concur
SUNDBERG, J., Dissents with an opinion
ENGLAND, J., Did not participate in this decision

SUNDBERG, J., dissenting.

I dissent from the majority opinion. I dissent not because of the decision reached on merits, but because I cannot conscientiously conclude, as does the majority, that there is direct conflict between the decision of the District Court of Appeal in the instant case and *Jacova v. Southern Radio & Television Co.*, 83 So.2d 34 (Fla. 1955). *Jacova* dealt altogether with the issue of whether a communications medium has a qualified privilege to publish the name or photo of a person who has become an "actor" in a newsworthy event. No element of trespass was presented in that case as it is here. In *Jacova* the plaintiff was photographed by television camera during a police "raid" at a cigar shop located in a hotel.

As explicated by the majority, the issue *sub judice* is whether the trial court erred in entering summary judgment on the count of the amended complaint which alleged trespass and invasion of privacy. The District Court of Appeal concluded that the poofs were insufficient to determine on summary judgment that there was no trespass based on the affidavits of 'custom and usage" utilized to supply the implied consent to the entry found by the trial judge. The opinion below expressly recognized the principle of *Jacova* with respect to the privilege to publish matters of legitimate, general public interest without being subject to a claim of invasion of privacy:

> "Unquestionably the fire in appellant's home coupled with the tragic death of her daughter was of obvious legitimate public interest. That the published matter complained of is of general public interest has always been considered a defense to a claim of invasion of privacy by publication. Finding that the matter published was of obvious legitimate public interest, the publication, per se, was not an invasion of privacy. However, if the entry by appellee's employees into appellant's home constituted a trespass or 'intrusion' it follows that such intrusion constituted a sufficient basis for the tort of invasion of privacy, entitling the injured party (appellant here) to such damages incident to the trespass action as may be proved to have resulted therefrom. . . ."
> (Footnotes omitted)
>
> Fletcher v. Fla. Publishing Co., 319 So.2d 100, 111 Fla. 1st DCA 1975).

It might be asserted that there is conflict on the issue of trespass with the decision of this Court in *Prior v. White*, 132

Fla. 1, 180 So. 347 (1938). The *Prior* case dealt with the constitutionality of a municipal ordinance declaring solicitation "in and upon private residences" a nuisance. As pointed out by the majority below, the opinion discussed the principle of implied consent supplied by custom and usage but in the context of the city's exercise of its police power to declare certain conduct a nuisance. The District Court of Appeal opinion carefully discussed and distinguished the *Prior* decision as not being determinative of the trespass issue *sub judice*. *Fletcher v. Fla. Publishing Co.*, supra, at 105.

Judge McCord in dissenting from the majority opinion below recognized that this is a case of first impression when he stated, "The question of implied consent to news media personnel to enter premises in a circumstance such as this appears to be one of first impression not only in this jurisdiction but elsewhere." 319 So.2d 100, 113 at 114.

There is little doubt in my mind that this case is one of great public interest which would justify consideration by this Court. Nonetheless, our jurisdiction is circumscribed by Article V of the Constitution, and it is the function under our constitutional scheme of the district courts of appeal to initiate review by this Court of questions of great public interest through certification. See Article V, Section 3(b)(3), Florida Constitution.

As so aptly stated by Justice Drew in *Fla. Power & Light Co. v. Bell*, 113 So.2d 697, 699 (Fla. 1959):

> ". . . Although the question at hand is not whether certiorari should be granted but whether the case is one within the express limitations of our constitutional provisions, the same principals of division of appellate jurisdiction were plainly operative in the drafting of our amended judiciary article and must influence any

interpretation of its terms. The constitutional objectives can be achieved and the creation of the district courts justified only if we recognize that the primary function of this Court, particularly in the area of 'conflicts' here involved, is to stabilize the law by a review of decisions which form patently irreconcilable precedents. . . ."

Finding no decisional conflict and the absence of certification of the question to this Court by the District Court of Appeal, First District, I would discharge the writ for lack of jurisdiction.

IN THE SUPREME COURT OF FLORIDA

MONDAY, JANUARY 10, 1977

FLORIDA PUBLISHING COMPANY,
a Florida corporation,
Petitioner (Defendant),

vs.

KLENNA ANN FLETCHER, ETC.,
Respondent (Plaintiffs).

On consideration of the Petition for Rehearing filed by Respondent Kay Fletcher and Reply thereto, it is ordered that said petition is denied.

OVERTON, C.J., ADKINS, BOYD, AND HATCHETT, JJ., AND ROBERTS, RET. J., CONCUR

SUNDBERG, J., DISSENTS

A True Copy

TEST:

/s/ SID J. WHITE
SID J. WHITE
Clerk Supreme Court.

Y,CC: Hon. Raymond E. Rhodes, Clerk
Hon. Major B. Harding, Judge
Hon. Rudolph J. Inman, Jr.
Hon. Ellis E. Neder, Jr.
Hon. Harold B. Wahl with copy for Messrs, Daniel, Feagin, Walters
Hon. George D. Gabel, Jr.

Rogers and Wells, Hon. Richard N. Winfield,
Hon. Betty B. Robbins
Isler, Higby, Brown & Smoak, Hon. Charles S. Isler, Jr.,
Hon. George P. Daniels
Hon. William C. Ballard
Hon. Ted R. Manry, III
Hon. J. Laurent Scharff
Mr. A. A. Fredrickson
PAUL & THOMSON, Hon. Dan Paul, Hon. Sanford L. Bohrer
FLEMING, O'BRYAN & FLEMING, Hon. John W. Fleming,
Hon. Rex Conrad, Hon. Paul Regensdorf
KIRKLAND & ELLIS, Hon. Don H. Reuben, Hon. Lawrence
Gunnels, Hon. Samuel Fifer, Hon. James A. Klenk
Hon. William G. Mateer
AUSLEY, McMULLEN, McGEHEE, CAROTHERS AND
PROCTOR
Hon. DuBose Ausley, Hon. C. Gary Williams
Hon. Robert L. Shevin, Hon. James D. Whisenand
Hon. Sharyn L. Smith

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

NO. 73-3374 DIVISION "L"

KLENNA ANN FLETCHER,
a/k/a KAY FLETCHER,
Plaintiff,

vs.

FLORIDA PUBLISHING COMPANY,
a Florida corporation,
Defendant.

AMENDED COMPLAINT FOR TRESPASS, INVASION
OF PRIVACY, AND INTENTIONAL INFLICTION
OF EMOTIONAL DISTRESS

The plaintiff, Klenna Ann Fletcher, a/k/a Kay Fletcher (hereinafter "Kay Fletcher"), sues the defendant Florida Publishing Company, a Florida corporation and alleges:

COUNT I

1. This is an action for compensatory damages in excess of the sum of $5,000.00, exclusive of interest and costs and for punitive damages in the amount of $1,000,000.00.

2. At all times hereinafter mentioned, the plaintiff, Kay Fletcher, was the owner of and was in lawful possession of that certain home located at 2743 Castellon Drive, Jacksonville, Duval County, Florida, which was used and occupied as the family residence of the plaintiff, Kay Fletcher and her children and particularly her child, Cindy Sloan Fletcher.

3. At all times hereinafter mentioned, the defendant, Flor-

ida Publishing Company, is a Florida corporation, having its place of business at Jacksonville, Florida and is the owner and publisher of "The Florida Times Union" newspaper.

4. On September 15, 1972, while the plaintiff was temporarily absent from the City of Jacksonville and absent from her residence on Castellon Drive, a fire broke out in the home which caused the death of the plaintiff's daughter, Cindy Sloan Fletcher, in one of the bedrooms in the plaintiff's home. The silhoutte of the deceased, Cindy Sloan Fletcher, was left on the bedroom floor of the plaintiff's home, due to the said fire and the smoke in the home.

5. Immediately after the fire was extinguished on September 15, 1972, and while the plaintiff was still temporarily absent from her home, the defendant Florida Publishing Company, acting through its agents and employees, who were acting within the scope of their employment, authority and agency, did wrongfully enter the plaintiff's said home without requesting or receiving prior authorization from the plaintiff and without the plaintiff's knowledge or consent. Such wrongful entry and trespass was made by the defendant's agents and employees for the purpose of taking photographs of the silhouette left by the body of the plaintiff's daughter, Cindy Sloan Fletcher, on the bedroom floor in the plaintiff's home, as evidenced by attached Exhibit "A" and Exhibit "B" and Exhibit "C" filed in this cause.

6. (a) Said wrongful entry into the plaintiff's home and the taking of photographs in the bedroom of the plaintiff's home constituted a trespass and an invasion of the privacy of the plaintiff's home and an invasion of the plaintiff's privacy.

(b) The defendant ratified, adopted and confirmed the

actions of its agents and employees alleged herein and the trespass an intrusion alleged herein by the defendant publishing, without the plaintiff's consent the photograph and article in the newspaper, Exhibit "C" filed in this cause.

7. The defendant's wrongful acts as alleged herein, wrongfully entering the plaintiff's home and trespassing therein and invading the privacy of the plaintiff's home and the plaintiff's privacy were done willfully, unlawfully, malliciously and with a total and wanton disregard for the plaintiff's rights and the plaintiff's feelings.

8. By reason of the defendant's said wrongful acts as alleged herein, the plaintiff has been deprived of her right of privacy and of her right to the exclusive use and possession of her home, the plaintiff has been subjected to mental and physical suffering, the plaintiff has become frightened, nervous and upset, the plaintiff has been made to feel insecure and unsafe in her said home, the plaintiff has suffered and been subjected to extreme humiliation and public ridicule and the defendant's wrongful acts have caused the plaintiff severe mental and emotional distress.

WHEREFORE, the plaintiff, Kay Fletcher, demands judgment against the defendant Florida Publishing Company, a Florida corporation, for compensatory damages in excess of $5,000.00 and for punitive damages in the sum of $1,000,000.00 and demands trial by jury.

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Civil Action No. 73-3374-CA

Division "L"

KLENNA ANN FLETCHER,
Plaintiff,

vs.

FLORIDA PUBLISHING COMPANY,
a Florida corporation,
Defendant.

ANSWER TO COUNT I OF COMPLAINT

Now comes the defendant and, *subject to its motions herein*, files this Answer to plaintiff's complaint, Count I:

First Defense

Said Count states no claim on which relief may be had against defendant.

Second Defense

There is no valid claim for trespass or invasion of privacy here. By custom and usage, the news media may lawfully enter upon private premises where an event of public interest and concern takes place, when they do so peacefully, without force, without objection, do no physical damage to such premises, and the entry is open and for the purpose of publication on such matter of public interest and concern. This is what

defendant's employee did on this occasion.

Third Defense

Defendant's photographer Cranford was invited into the house by the Fire Marshal and police who were investigating the fire and death, he accompanied them, and he was specifically requested by the Fire Marshal to take, and did take, the silhouette picture, which the Fire Marshal and police advised was important to their investigation of the fire and its origin.

Fourth Defense

Bill Cranford, the photographer who took the silhouette picture, entered the premises along with, and at the invitation of, the public fire and police officers investigating death and possible arson. Cranford took the silhouette picture at the specific request and direction of such public fire and police officers as part of their official investigation, such picture is a part of the official investigation file, and Cranford was the agent of such public officers. The entry of the public fire and police officers was for a lawful purpose and was not trespass, and the entry of Cranford with them was likewise not a trespass.

Fifth Defense

No unreasonable restraints may be put upon the working news reporter and photographer in their coverage of a matter of public interest and concern such as that disclosed by the complaint and its attached exhibit here. To hold the defendant liable for the type of peaceful and accustomed entry here would be an unconstitutional prior restraint on publication under the First and Fourteenth Amendments to the United States Constitution.

Sixth Defense

It is standard and accepted custom, usage and procedure, in the public interest, and not trespass, for representatives of the news media to enter upon private premises where the Fire Department has just extinguished a fire, particularly when the fire is of mysterious origin, a death has resulted, the authorities are investigating possible arson, and the news media can enter peacefully, openly, and without objection, and in company with the fire and police officers.

Seventh Defense

There are no sufficient facts alleged or shown to justify the recovery of punitive damages.

Eighth Defense

As to the allegations of Count I, defendant admits paragraphs 3 and 4 and denies all other allegations of said Count.

Ninth Defense

The right of privacy does not prevent any publication of matter which is of general or public interest, and the publication here came within that category. See *Cason v. Baskin* (Fla. 1947) 30 So.2d. 635, 638; *Jacova v. Southern Radio* (Fla. 1955) 83 So.2d 34, at 40; *Benson v. Florida Publishing Company* (Fla. 1971) 262 So.2d. 196, where this Court entered up summary judgment for the newspaper at 37 Fla.Supp. 157; *Time v. Hill* (1967) 385 U.S. 374; and *Rosenbloom v. Metromedia* (1971) 403 U.S. 29, at 43, 44, 48.

Tenth Defense

Plaintiff may not sue for the invasion of privacy of a deceased person regardless of how close the relationship.

Eleventh Defense

(a) There was no forced entry here, the entry was peaceable, quiet and open, and there was no physical damage done.

(b) The courts may not review the manner in which a newspaperman obtains his information, and may not restrain the publication of news, or impose prior restraint upon such publication, or impose damages for such publication, merely because the person responsible for the publication obtained it in a manner that may perhaps be illegal or immoral; particularly when the matter is of general or public interest; and defendant alleges the publication here was of such general and public interest.

Twelfth Defense

Even if there were trespass here, which defendant denies, there was no force, surreptitious entry, deception, use of hidden electronic equipment, or other similar action, or actual damage, plaintiff's damages would be limited at the outside to nominal damages, and there is no claim in good faith of sufficient damages to invoke the jurisdiction of this Court.

LOFTIN AND WALL

By:

.....

By: /s/ HAROLD B. WAHL
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32202.

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA.

Case No. V-101

KLENNA ANN FLETCHER,
a/k/a KAY FLETCHER,
Appellant,

vs.

FLORIDA PUBLISHING COMPANY,
a Florida corporation,
Appellee.

SUGGESTION TO CERTIFY TO THE SUPREME COURT

Without prejudice to its Petition for Rehearing, Appellee (Defendant) respectfully suggests that this Court certify to the Supreme Court of Florida under Florida Appellate Rule 2.1(a)(5)(b) and Article V, Section 3(3) of the Florida Constitution, that the decision here passes upon a question of great public interest, for the following reasons:

1. This decision affects not only the public but every newspaper, every television station, every radio station, and every aspect of the news media, in every part of Florida. It involves the public's access to news, and the right to know what goes on in matters of public concern, as shown by the affidavits filed herein. Accordingly, it necessarily involves a most important question of statewide significance.

2. There are important constitutional questions here under both the Florida and United States Constitutions.

3. Not only is this question important both to Florida and nationwide, but the depositions taken by *plaintiff* (when the

witnesses were sworn as witnesses for the plaintiff) of Homicide Sergeant Short and Fire Marshal Melzer reflect that Short has personal knowledge of several dozen situations where the news media went *into* private homes in Duval County, and Fire Marshal Melzer has personal knowledge of over a hundred occasions where the news media went *into* private homes and bedrooms in Duval County, under a common custom, usage and practice for the news media to so enter peacefully and without objection, along with public officials investigating fires, arson, or crimes, to report on such matters of public interest. Here there was an ongoing investigation of death by fire and suspected murder by arson.

4. No one has shown where there has heretofore been any question as to such custom and practice.

WHEREFORE, for the foregoing reasons, we respectfully suggest that it is clear that this decision has passed on a question of the greatest public interest throughout the State of Florida and one that should be passed upon by the highest court in this State so that the rule of law will be uniform throughout Florida.

Appellee (Defendant) therefore suggests that this Honorable Court certify to the Supreme Court of Florida that the decision passes upon a question of great public interest.

WAHL AND GABEL

By: .....
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Attorneys for Defendant-Appellee.

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I HEREBY CERTIFY I have this September 23, 1975, mailed a copy of the foregoing to Rudolph J. Inman, Esquire, 2229 Gulf Life Tower, Jacksonville, Florida 32207, and to Ellis E. Neder, Jr., Esquire, 803 Blackstone Building, Jacksonville, Florida 32202, attorneys for the plaintiff.

.....

Supreme Court, U. S.
FILED
MAY 3 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1398

KLENNA ANN FLETCHER,
Petitioner,

vs.

FLORIDA PUBLISHING COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1398

KLENNA ANN FLETCHER,
Petitioner,

vs.

FLORIDA PUBLISHING COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTION

Petitioner (Plaintiff) has filed Petition for Certiorari to review the opinion of the Supreme Court of Florida reported at 340 So.2d 914 (Petitioner's A-38). Hereinafter we refer to pages in Petitioner's Appendix as A-.....

While Petitioner cites 28 U.S.C. 1257(3), we are mystified as to the basis on which she asserts jurisdiction in this Court. The Florida Court held that under *both* Federal law [*Time* v. *Hill*, 385 U.S. 274 (1967)] and Florida law [*Jacova* v. *Southern Radio*, 83 So.2d 34 (Fla. 1955)], there was no invasion of privacy for an accurate account of a matter of public interest (here an admitted fair account of death and investigation of suspected arson and murder); and that there was no trespass under the facts here where there was implied consent to entry under common custom and usage.

The decision is correct on adequate non federal grounds.

Even a cursory study of Petitioner's complaint (A-53) and the opinions, shows that Petitioner neither raised nor preserved, nor did the Court decide or pass upon, her alleged Constitutional questions.

We shall refer to Petitioner sometimes as Plaintiff; to the Respondent on occasion as Defendant.

QUESTIONS PRESENTED

We cannot follow Petitioner's Questions. Questions (B) and (D) rely on 42 U.S.C. 1983 (civil rights), whereas at no time until now has that statute even been *mentioned*—let alone *relied on*. There is no reference to that statute as such in the pleadings or opinions. Plaintiff did not mention *or refer to* 42 U.S.C. 1983 in her complaint (A-53).[1] Questions (A), (C) and (E) require restatement.

---

1. *Dietemann* v. *Time*, 449 F.2d 249 (CA-9, 1971) is cited by the intermediate Florida Court at A-28. But there is *no discussion* of 42 U.S.C. 1983, and the Federal Court expressly states "We do *not reach* that issue." And in *Dietemann*, there was entry by subterfuge and deceit and clandestine electronic recording without consent. What happened in *Dietemann* has been compared to Watergate.

But here, as held in *Prior* v. *White*, 132 Fla. 1, 180 So. 347 (1938):

> "Permission to come upon one's premises may be implied from custom, usage or conduct."

And the Court here held that the defendant's entry was peaceful, unopposed, and authorized by such common custom, usage and conduct. See also *Paul* v. *Davis*, 424 U.S. 693 (1976) holding no action *under* 42 U.S.C. 1983 for publication (even where libelous—and here the publication, including the photograph, was admittedly accurate).

We think Petitioner's five questions might properly be re-stated as follows:

(1) Is there an invasion of privacy of plaintiff by defendant when defendant published a fair and accurate account of a matter of admitted public interest and concern (death and investigation of suspected arson and murder)?

(2) Is there trespass (or invasion of privacy by trespass so that *damages for publication* may be had) when defendant media representatives entered the premises under the factual situation as set out by the Supreme Court of Florida, 340 So.2d 914, at 915-916 (A-39):

> "The fire and police departments were called by a neighbor who discovered the fire, but too late to save the child. A large group of firemen, news media representatives, and onlookers gathered at the scene and on Mrs. Fletcher's property.
>
> "When the Fire Marshal and Police Sergeant Short entered the house to make their official investigation, they invited the news media to accompany them, as they deposed was their standard practice. The media representatives entered through the open door; there was no objection to their entry; they entered quietly and peaceably; they did no damage to the property; and their entry was for the purpose of their news coverage of this fire and death.
>
> "The Fire Marshal desired a clear picture of the 'silhouette' left on the floor after the removal of Cindy's body. He and Sergeant Short in their depositions explained that the picture was important for their respective investigations to show that the body was already on the floor *before* the heat of the fire did any damage in the room. The Fire Marshal took

one polaroid picture of the silhouette, but it was not too clear, he had no further film, and he requested photographer Cranford to take the 'silhouette' picture which was made a part of the official investigation file of both the Fire and Police.

"This picture was not only part of the investigation but News Photographer Cranford turned it and his other pictures over to the defendant newspaper. It and several other pictures appeared in the news story of The Florida Times-Union on September 16, 1972."

(3) Did Petitioner timely and properly raise and preserve her alleged Federal questions so as to give this Court jurisdiction to review on certiorari? [See Supreme Court Rule 23.1(f)].

STATEMENT OF THE CASE AND FACTS

Petitioner has filed neither the record in the court below nor [as suggested by Supreme Court Rule 23.1(f)] an Appendix setting up the facts with appropriate support. We respectfully suggest that the fundamental and accurate facts are those set up in the summary judgment entered by the trial court (40 Fla.Supp. 1—A-14, et seq.) and summarized by the Florida Supreme Court (340 So.2d 914, at 915-916, et seq. above—A-38 et seq.).

What we have here is a case where Petitioner sued for *damages* for invasion of privacy by *publication*. When confronted with the fundamental law that there can be no invasion of privacy on publication of a fair and accurate account of a matter of public interest, plaintiff sought the same *damages* for *publication*, but on the added theory of *trespass*. She thus tried to get by indirection what she could not get directly, i.e., damages for publication.

To this latter contention, the Florida Supreme Court held (340 So.2d at 917—A-43) "that consent is an absolute defense to an action for trespass and that the defense of custom and usage is but another way of expressing consent by implication"; that there was no genuine issue of material fact as to such consent by custom and usage here; and upheld summary judgment for the defendant.

As stated by the trial court (40 Fla.Supp. 1—A-7-9):

"Not only did the Fire Marshal and Detective Sergeant Short testify it was common custom and usage to permit the news media to enter under the circumstances here, and of the great number of times they had been permitted it in private homes, but many affidavits were filed to the same effect, including those of Duval County Sheriff Carson and Florida Attorney General Shevin.

"Similar affidavits have been filed from the Chicago Tribune; the ABC-TV News New York; the Tallahassee Democrat; the Pensacola Journal; the Associated Press; the President of the American Newspaper Publishers Association; the Miami Herald; United Press International; the Florida Times-Union and Jacksonville Journal; the Washington Post; TV-12 at Jacksonville; TV-10 at Miami; TV-4 at Jacksonville; the New York Daily News; the Milwaukee Journal; the Birmingham Post-Herald; the Memphis Commercial-Appeal; the Macon Telegraph; and the Tampa Tribune; all attesting that it is *common usage, custom and practice for news media to enter private premises and homes under circumstances like those here.*" (Italics here and elsewhere added by us unless otherwise indicated).

* * *

"In Mrs. Fletcher's deposition, she stated she was in New York at the time of the fire; there was no one at the scene who objected to the entry; and she makes it clear she does not contend there was any force used for entry, or any physical damage done to the premises.

"Plaintiff likewise concedes that it was perfectly proper for the Fire and Police to enter without permission. The Fire and Police used the picture as part of their official investigation and actually requested that such picture be taken and would have made such request even had the Plaintiff been there and objected. There is no evidence that any restriction was placed upon the Defendant's photographer in the use of the photographs he took at the request of the Police and Fire Marshal.

"Numerous affidavits, as above set forth, have been filed by the Defendant in support of its motion for summary judgment. All these affidavits attest to the fact that it is common usage, custom and practice for news media to enter private premises and homes to report on matters of public interest or a public event. The court therefore finds that there is no genuine issue of material fact and that as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and non-actionable when it is done under common usage, custom and practice. The court further finds that the entry complained of in Count I of the Plaintiff's complaint was one permitted by common usage, custom and practice, and that the Defendant is entitled to a summary judgment as a matter of law as to matters alleged in Count I of the Plaintiff's complaint."

ARGUMENT

Petitioner has approximately two pages in support of jurisdiction here. We shall first advert to the jurisdictional question.

No Basis for Certiorari Jurisdiction

We fail to see where either in those two pages, or elsewhere in her petition, Petitioner has shown any basis for certiorari jurisdiction in this Court under 28 U.S.C. 1257(3), the pertinent portion of which is italicized:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.*"

The opinion of the Supreme Court of Florida, attempted to be reviewed by certiorari, was not based primarily on Constitutional grounds, nor did it mention the Constitutional provisions or the civil rights statute set up by Petitioner.

To the contrary, the Supreme Court of Florida cited *Florida* law and non federal grounds to support adequately its ruling that

(1) There was no invasion of privacy on a fair and accurate publication on a matter of public interest; and

(2) Peaceful unopposed entry by the news media without objection, without damage, to cover a matter of

public interest, at the invitation of public officers investigating arson and murder, was, under the facts here, not trespass, for it was under common custom and usage.

As stated at 340 So.2d 918 (A-44):

> "The District Court erred in reversing summary judgment for petitioner as to Count I. The trial court properly determined from the record before it that there was no genuine issue of material fact insofar as the entry into respondent's home by petitioner's employees became lawful and non-actionable pursuant to the doctrine of common custom, usage, and practice and since it had been shown that it was common usage, custom and practice for news media to enter private premises and homes *under the circumstances present here.*"

There is no basis for certiorari jurisdiction. Just because a decision passed upon a matter of wide public interest is no basis for certiorari jurisdiction in the United States Supreme Court. This is true even though a decision to the *contrary* of the results reached here would run afoul of defendant's Constitutional guarantees. The Florida Supreme Court decision has adequate non federal grounds—Florida and general law—to support it. Petitioner to the contrary notwithstanding, the Florida Supreme Court has not decided any substantial Federal questions contrary to Petitioner's Constitutional rights.

Supreme Court Rule 23.1(f) provides:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the *stage in the proceedings* in the court of first instance and in the appellate court, at which, and the manner in which, *the federal questions sought to be reviewed*

> *were raised;* the *method* of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the *way in which they were passed upon by the court;* such pertinent *quotations of specific portions of the record,* or summary thereof, with specific reference to the *places in the record* where the matter appears (e.g., ruling on *exception,* portion of the *court's charge* and *exception* thereto, *assignment of errors*) as *will show that the federal question was timely and properly raised so as to give this court jurisdiction* to review the judgment on writ of certiorari." (Italics added by us.)

We respectfully submit that Petitioner did not properly raise below her alleged Federal questions. In her "Statement of the Case", Petitioner has not followed the rules of this Court to demonstrate her attempt to so raise such questions. As stated, a cursory reading of her complaint (A-53) and the opinions below demonstrates that Petitioner has not timely and properly raised the Federal questions so as to give this Court jurisdiction on certiorari.

Right of Privacy on Publication—Federal Law

In *Time* v. *Hill* [385 U.S. 274 (1967)], this Court expressly held at 388 and 389 (even as to an alleged *false* statement):

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which *exposes persons to public view, both private citizens* and public officials. *Exposure of the self to others in varying degrees is a concomitant of life*

in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. '*Freedom of discussion,* if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v Alabama, 310 US 88, 102, 84 L ed 1093, 1102, 60 S Ct 736. 'No suggestion can be found in the Constitution that the *freedom there guaranteed for speech and the press* bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' Bridges v California, 314 US 252, 269, 86 L ed 192, 206, 62 S Ct 190, 159 ALR 1346. We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, *is a matter of public interest.* 'The line between the informing and the entertaining is too elusive for the protection of . . . [*freedom of the press*].' Winters v New York, 333 US 507, 510, 92 L ed 840, 847, 68 S Ct 665. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, '. . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . . .' New York Times Co. v Sullivan, supra, 376 US at 271-272, 11 L ed 2d at 701, 95 ALR2d 1412. As James Madison said, 'Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.' "

Here we had an accurate and fair statement on a matter which everyone agreed was a matter of public interest—much more than, as in *Time,* "the opening of

a new play". Here, a 17-year-old was dead in a fire, and the authorities suspected and investigated arson and murder.

We quote from *Cox* v. *Cohn,* 420 U.S. 469 (1975) at 492:

> "In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he *relies necessarily upon the press* to bring to him in convenient form the facts of those operations. *Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of the government,* and official records and documents open to the public are the basic data of governmental operations. *Without the information provided by the press,* most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." (Here, a government investigation of fire, arson and murder.)

Florida Law

Under Florida law [and under *Gertz* v. *Welch,* 418 U.S. 323 (1974), the states can *add* to the protection given the news media when the right of the people to know be concerned] defendant was likewise free of liability to plaintiff here. We quote from *Jacova* v. *Southern Radio,* (Fla. 1955) 83 So.2d 34, at 36:

> "And it is true that it is settled law in this state—as in other states in which an action for invasion of privacy is recognized—that as to these fields the right of privacy does not necessarily protect a person against the publication of his name or photograph in

connection with the dissemination of legitimate news items or other matters of public interest. Cason v. Baskin, 155 Fla. 198, 20 So.2d 243, 168 ALR 430; Id. 159 Fla. 31, 30 So.2d 635. Or, as stated by some courts, 'Where one, *whether willingly or not, becomes an actor in an occurrence of public or general interest,* he emerges from his seclusion, and it is not an invasion of his "right of privacy" to publish his photograph with an account of such occurrence'."

Florida law, under common custom and usage, infra, shows there was no trespass. Florida law, under privacy, above, shows there was no invasion of privacy.

So, irrespective of Federal law, Florida law provided an adequate basis for the decision of the Florida Supreme Court.

It is true that the *First Amendment, Time, Cox, McKee, Martin* and other Federal cases, infra, would have *required* the same result.

Nonetheless, the decision has adequate support under Florida law.

Petitioner Cannot Claim Damages for Publication About Another

Here the primary claim for damages for invasion of privacy is the publication of the silhouette photograph of the body of plaintiff's deceased daughter (A-1).

As held by the trial court (40 Fla.Supp. 1—A-4), and never seriously questioned:

> "Also, it is settled that one cannot recover for the alleged invasion of privacy of a deceased person, no matter how close the relationship of the deceased to the one seeking damages. See *Cordell* v. *Detective*

> *Publications* (CA-6, 1969) 419 F.2d 989; 32 Fla.Jur., Torts, Sec. 10, 1973 Supplement; and *Young* v. *The Week That Was* (CA-6, 1970) 423 F.2d 265."

Damages for Publication—Trespass—Consent by Common Custom and Usage

Petitioner tried to make out a right to recover damages for publication of an *accurate* story on a matter of *public* interest, by claiming *trespass*.

As pointed out by the Florida Supreme Court (340 So.2d at 917—A-43) "consent is an absolute defense to trespass" and the defense of custom and usage "is but another way of expressing consent."

The District Court states (A-43):

> "We do not here hold that a trespass or 'intrusion' did in fact occur * * * We simply hold such is alleged * * * and the proofs * * * are insufficient to resolve the point by summary judgment."

The Florida Supreme Court reversed and affirmed summary judgment entered by the trial court. We have, therefore, at *most* a Florida procedural point as to when, under state law, summary judgment is proper.

The law is too well settled to require argument that "consent is an absolute defense to trespass" and that "consent may be implied by common custom, usage and practice". See 52 Am.Jur.2d, Trespass, Sec. 39; 87 C.J.S., Trespass, Sec. 49b; Conley on Torts (4th Edition) Secs. 251 and 248; Harper and James on Torts, Sec. 1.11; Restatement of the Law of Torts, Sec. 167(d), Trespass, page 403; *Prior* v. *White,* 132 Fla. 1, at 19, 180 So. 347 (1938); *Martin* v. *Struthers,* 319 U.S. 141, 149 (1943); and *McKee* v. *Gratz,* 262 U.S. 127 (1922) (cited by the trial court at 40 Fla.Supp. 1—A-5-6).

The result would be the same without the invitation of the police officers. The vital element is peaceful, unopposed entry, without physical damage, under common custom and usage, for the coverage of a matter of real public interest and concern about which the public has a right to know.

In *Cantrell* v. *Forest City Publishing Company*, 419 U.S. 245 (1974), the photographer, as here, was *in the house* without permission. The widow owner was away, just as here. He took many pictures in the house. His pictures were accurate—were *not* false light invasion of privacy—and a judgment in his favor (overturning jury verdict against the photographer) was upheld by this Court.

As stated by the trial court below (A-7):

"In paragraph 12 of her complaint (in *Cantrell*), a copy of which has been furnished the court, Plaintiff alleged 'an unwarranted trespass' on her property without her consent, and in 'in deliberate and scornful disregard of the rights of plaintiffs to security of their persons, family and home and their precious right of privacy'. There, as here, trespass was relied on as a basis for claiming damages for the publication.

"There is no force used in the entry and no physical damage to the property. The *publication* complained of (not the picture) was a feature story which in the words of the court, 'placed the Cantrell family in a bad light because of its inaccuracies and untruths'. * * *

"In *Cantrell*, the court ruled that the 'judgment of what is newsworthy must remain primarily the function of the publisher', that there was no basis

to hold there was 'no newsworthiness', and that in the absence of 'calculated falsehood' [See *St. Amant* v. *Thompson* (1968) 390 U.S. 728, 733] judgment must be entered for defendant photographer (on the accurate photographs) although the Court upheld the judgment against the defendant publisher on the 'false light' stories with their 'calculated falsehoods'."

This Court in *Cantrell* thus made a distinction between damages for *false* publication, and *no* damages for fair and accurate photographs, even where the photographer entered the home peacefully but without the express consent of the absent owner.

CONCLUSION

It is clear that there is no basis for the Court to grant certiorari here.

Far from *plaintiff's* Constitutional rights being invaded, a decision *contrary* to that below would invade the First Amendment guarantees of freedom of press and speech, and of the right of the public to know about matters of public interest and concern.

There can be no invasion of privacy on an accurate publication of a matter of public interest.

There can be no trespass by the news media when the entry is peaceful, without objection, on the invitation of public officers investigating arson and murder, to cover such newsworthy matters, and is under common custom, usage and practice.

Finally, Petitioner neither raised nor preserved, and the Florida court did not pass upon, her alleged Constitutional points.

The Florida decision rests on adequate non federal grounds.

Respectfully submitted,

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